93-40

No.

Supreme Court, U.S.
FILED
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In The Supreme Court of The United States
Spring Term, 1993

John J. Scinto, Petitioner Pro Se

v.

R. David Stamm,etal
Respondents

Petition for Writ of Certiorari to
The Supreme Court of Connecticut

Respectfully submitted

John J. Scinto, Petitioner Pro Se
101 Mill River Drive
Stratford, CT 06497
(203) 375-8596

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD NOW SETTLE THE CONFLICT THAT EXISTS AMONG THE VARIOUS STATE COURTS AND THE FEDERAL COURTS OF APPEALS ON THE APPLICATION OF THE MATHEWS v. ELDRIDGE DUE PROCESS BALANCING TEST TO BAR APPLICANTS

II. WHETHER THIS COURT SHOULD NOW SETTLE THE CONFLICT BETWEEN THOSE COURTS AND THIS COURT OVER THE SAME ISSUE

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JURISDICTION

The balancing test favors the Petitioner in this case, and he comes to this Court because his motion for rehearing (reargument and reconsideration en banc) was denied on March 4, 1993. The final judgment of the Connecticut Supreme Court had been published on February 9, 1993. The Petitioner's motion for reargument followed timely on February 16, and his addendum on Feb. 19, still timely

The jurisdiction of this Court is invoked under 28 USC 1257 (3).

For further analysis of jurisdiction please see the Statement of the Case.

STATEMENT OF THE CASE

The judgment and the balancing test I seek to have reviewed are the denial by the Connecticut Supreme Court, the highest state court in Connecticut, of my motion for reargument and reconsideration and addendum, and the previous affirmance of the Defendants-Respondents' motion for summary judgment.

The Petitioner, a citizen of the United States, filed an application and petition to the Superior Court in Connecticut claiming gross negligence in the grading of his bar exam of July, 1989, in that he "obviously deserved" many more points on the exam. He alleged that at least one grader gave him the additional 1/2 raw score point he needed to pass the overall bar exam under the contested scoring system. He also alleged that the grading system is obviously and grossly arbitrary and capricious in that it

precludes graders from giving a grade of minimal competency or barely passing on any essay answers, although the exam purports to test minimal competency. Mandatory fractional grading and other grossly arbitrary and capricious grading methods were also used. Thus, he alleged that his substantive and procedural due rights of property and liberty were infringed upon under the 5th and 14th amendments of the United States Constitution.

The Petitioner also submitted as evidence (not timely objected to) his essay answers, the questions, sample answers published by the committee, his scoresheets, and regulations. All of it was subject to judicial notice, and none of it was timely objected to. Furthermore, the Defendants' attorney alleged that she did not know whether there were any model answers during the hearing of October 9, 1990. It turns out that there are model answers. They were allu-

ded to in the opinion of this case at pages 529, 533, 536; and I have not been given a copy of them.

The Petitioner first raised the federal questions in his application and petition to the Superior Court on February 23, 1990. He then put these allegations into his designation of contents of record filed with the Connecticut Appellate Court on February2, 1992. That included his complaint, the decisions, memoranda, evidence, and other documents. Then he referred to all of these documents in his appellate brief of March 9, 1992. Furthermore, he alleged the same grading procedures violated the same due process rights of other bar applicants. He asked the Superior Court for a hearing on his essay examination, for his admission to the bar, for a declaration that the bar exam rules were contrary to due process and therefore unconstitutional; and for

a rule that graders be allowed to grade each essay answer as minimally competent or barely passing if they so decide.

Moreover, the Petitioner asked the Defendants for an administrative hearing.

On December 5, 1990 Judge Thim of the Superior Court ruled that there was jurisdiction for a judicial hearing on the grading of the Petitioner's bar exam, and that the declaratory judgment part of the suit would be postponed until after a hearing on the grading of the Petitioner's exam.

Next, the Petitioner made a motion to add his bar exam of February 1990 to the complaint. The Defendants made a stipulated agreement to the effect, and Superior Court Judge Nigro ruled to the same effect, namely that the February claim would be added to the complaint without the need for an amendment, and that the Defendants' motion to dismiss would

apply to it also. This is evidenced on page 9 of the transcript of October 9, 1990. Next, the Defendants' answer of December 17, 1990 failed to address the Petitioner's February 1990 exam, and thereby admitted that he had passed it.

The Petitioner then filed a motion for summary judgment on January 3, 1991. He had filed his affidavit on July 20, 1990. The Defendants made a cross motion for summary judgment on January 30, 1991 with affidavit.

After two letters and several phone calls, and after a 6 month's wait, on February 19, 1991 the Petitioner received the transcript of the August 20, 1990 hearing. It was replete with error, and therefore the Petitioner made motions for corrections and for the deposition of the court reporter. Judge Thim denied them on September 19, 1991 but ruled that the Petitioner's memo-

randum in opposition to dismiss would suffice as court evidence. This is also a precedent for allowing my complete case file to become the printed record on appeal.

During the hearing of November 4, 1991 on the Defendants' cross motion for summary judgment, I stated that many lawyers in Connecticut passed the bar exam by having sufficiently high essay scores to offset their failing national multistate scores, at page 28 of the transcript. Since the Defendants did not object, my allegation was admitted as judicial evidence. I also stated that I had passed the national exam 4 times.

During the December 2, 1991 hearing Superior Court Judge McGrath admitted to knowing of informal bar exam hearings in Connecticut. That was a party's judicial admission since the Superior Court judges

are defendants in this case as principals of their agent, the bar examining committee. The Defendants' attorney also made this judicial admission since he did not object to it or deny it.

Judge McGrath then granted the Defendants' cross motion for summary judgment because of a lack of subject matter jurisdiction. As a matter of law this was improper, since granting a motion to dismiss is the proper way to deny jurisdiction. Furthermore, Judge Thim had already denied the motion to dismiss, and had acknowledged jurisdiction for a judicial hearing on my bar exam.

The Petitioner appealed to the Appellate Court of Connecticut, and soon after the Defendants moved to transfer the the appeal to the highest state court, and the motion was granted. The Petitioner specifically raised the issue

of the Defendants' failure to answer his allegations of passing the February 1990 bar exam. He also specifically raised the issue of whether the summary judgment was erroneous, including the sub-issues of error in the light of several jurisdictional citations, the Defendants' admission of jurisdiction in the November 4, 1991 hearing, and a state history of informal bar exam hearings.

There have been several disputes of fact in this case, the most egregious of which were the dispute over whether a grade of 1.5 raw score points indicates that two different graders differed from each other by 100%; whether a grade of 1 (in a grading scale of 0 - 7) is gross misgrading of a correct answer; Hooban v. Bd. of Govs., 85 Wash. 2d, 774(1975) admonishes against extremely low grades; whether a grading system that precludes giving a minimal competency grade (3.6) on each essay question is gross negli-

gence since only whole number grades are allowed.

Defendant Stamm's affidavit which states that there is an average Connecticut passing grade on the multistate exam, is inconsistent with his prior statement in the same affidavit that there is no such thing as a passing grade on the multistate exam. This renders his testimony disputable and impeachable.

Another genuine dispute over a material fact is the computation error in the Petitioner's February 1990 scoresheet which was filed in the Superior Court on November 11, 1991 and a copy of which was handed to Judge McGrath on December 2, 1991.

In this suit the entire case file is the printed record on appeal since Presiding Justice Callahan agreedto that at page 4 of the Supreme Court transcript of November 5, 1992.

ARGUMENT I

The balancing test of Mathews v. Eldridge, 424 US 319 (1976) has been misapplied in Scinto v. Stamm, 224 Conn. 524, 535, 536 (1993) which states that there is sufficient procedural due process in the unlimited reexamination provided for admission to the bar. However, unrepresented review is not due process. Schware v. Bd of Bar Ex of NM, 353 US 232 (1957).

Under the first prong of the test the strong private interest is admitted in the last paragraph of page 535.

The model answers alluded to in the second paragraph of page 536 were never turned over to me though I sought them in the hearing of October 9, 1990.

At page 537, the top paragraph, the opinion says that the loss of anonymity of the applicant in a grading hearing

would have an effect. However, judges are capable of handling that. Besides, anonymity can be lost when a grader recognizes an applicant's handwriting or style of expression, and thereby knows that the applicant is a repeater on the bar exam.

As for the lack of a calibration meeting, a judge could compare the answer at issue with the sample answers published by the committee, and he could judge them from his knowledge and experience. Making judgments on bar exam answers is very similar to the type of professional work a judge does almost every day. I have submitted the sample answers into evidence.

At the bottom of page 537 of the opinion in my case, Tyler v. Vickery, 517 F2d 1089 (1975, CA5) states that assuming that 1 of 100 applicants fails the bar exam because of arbitrary grading, the chance of that happening twice is

1 in a million. This is pure speculation. In my case, on the February 1990 scoresheet there is an obvious computation error which has never been acknowledged by the committee. Furthermore, relative to this exam the committee published a letter admitting erroneous grading by 2 graders. The 1 in a million speculation pales in comparison to this evidence.

ARGUMENT II

At the bottom of page 537, the court also says there is just one exception to the courts disallowing judicial regrading and that was Richardson v. Mc Fadden, 54 F2d 744 (1976). However, In re DeOrsey, 112 RI 537 (1973) regraded and passed 7 applicants in Rhode Island. Cupples v. Watson, 92 App DC 166 (1953) regraded in DC. And re Admission of Thorne, 635 P2d 22, 23 (1981, UT) regraded in Utah. I submit that the

conflict arising with the courts that do not grant jurisdiction for judicial hearings on regrading bar exams should be resolved in favor of judicial hearings.

At page 538 of the opinion in my case the court admits to bar examination judicial hearings jurisdiction for manifest unfairness. Hooban, supra; DeOrsey, supra at543; Barde v. Bd of Trustees,207 Conn 59,64 (1988). My case comes within this manifest unfairness jurisdiction because I alleged it in different words in my Superior Court complaint, and in my briefs to the Connecticut Supreme Court. Moreover, the gross misgrading practices delineated supra state a case of manifest unfairness.

ARGUMENT III

The following are more jurisdictions granting bar examination hearings:
Woodward v. Va. BBE, 420 FS 214 (1976,Va)
In re Mead, 361 NE 2d 403 (1977, Mass.)

App of Peterson, 459 P2d 703 (1969, AK)

Bowens v. Bd Law Ex, 291 SE2d 170, 172 (1982, NC App)

Loeb v. NY, 144 App Div 2d 813 (1988,NY)

Feldman v. BLE, 438 F2d 699 (1971,AR)

Bailey v. Bd Law Ex, 508 F Supp 106, 109 (TX 1980)

In re Reardon, 378 A2d 614 (1977, DE)

ARGUMENT IV

I submit that a right to a bar exam judicial hearing obviously makes the entire grading process more fair and just, and is a most important additional safeguard in the Mathews balancing test.

Furthermore, Zinermon v. Burch, 494 US 113 (1990) holds that predeprivation hearings must be given by the state where feasible. But otherwise, postdeprivation hearings are always required.

Citing Mathews and the balancing

test, the following cases give postdeprivation hearings under due process:

Gutzwiller v. Fenik, 860 F2d 1317 (6 Cir, 1988)

Dell Fargo v. San Juan Bautista, 857 F2d 638 (9 Cir, 1988)

Campo v. NYC Retire. Sys., 843 F2d 96 (2d Cir, 1988)

Dell Fargo also holds that gross negligence states a claim . Gutzwiller also holds that discrimination states a claim here.

The Scinto v. Stamm opinion speculates as to the expense on the judicial system because there might be a flood of bar exam petitions. Though this may be evidence of wide scale dissatisfaction with the bar exam system, it is based on mere speculation, not on reliable cost-benefit analysis. An indication that these fears are false is the fact that

after the February 1983 bar exam only 11 applicants even asked to see their essay answers.

The opinion in my case concludes that a bar examjudicial hearing for the purpose of regrading is not constitutionally required under Mathews, and thus the trial court properly granted the Defendants' motion for summary judgment. I submit that this is incorrect.

The only mention of the pre- versus post- deprivation hearing distinction in the entire report is made in the dissent, at page 541, top of the second paragraph, a "postermination hearing by a board." That would harmonize with Mathews which gave a postdeprivation hearing. I ask for the same.

Mathews denied only a predeprivation hearing. That is not at issue in my case. Mathews' postdeprivation judicial hearing satisfies the due process requirement of

5th and 14th amendments. See Mathews, supra at 332, 339, 349.

Some Connecticut cited supra which grant bar exam judicial type hearings are: In re Dinan, Fld Cty Bar v. Esterman, In re Griffith, Heiberger v. Clark, and Mrotek v. Nair.

ARGUMENT V

Regulation 5(e), which is promulgated by the bar examining committee in its instructional letters, has facial validity but it has been applied in a grossly arbitrary manner in grading my contested answers, I submit. It states: "The applicant's conclusion need not be in accord with the law of the State of Connecticut, but the applicant must demonstrate an ability to analyze and solve the legal problems involved."

This means that all minority holdings are of equal status in applying the

law to the question. Thus, if a grader is unsure as to whether he or she is reading an answer based on error or on some little known minority law, and he or she grades harshly on that answer because it differs from most or all of the other answers, he or she is grading in a grossly arbitrary manner. Such was the case with question # 11 of my July 1989 bar exam on which I correctly applied a small minority rule, the Rule in Shelley's Case. None of the sample answers mentioned it. I received a 1 out of a possible 7.

ARGUMENT VI

I submit that the Defendants have not met the rational relationship test. When grading is grossly arbitrary as has been delineated supra, there is no rational relationship between the grading of a bar exam and the choosing of de-

serving applicants. The following is a summary of those arguments based upon evidence: the 1.5 grade; the 1 out of 7; 3.6 for a passing grade; a barring of minimal competency grading on the essays; computational errors; a committee letter admitting erroneous grading. Schware v. Bd of Bar Ex, 353 US 232, 238-240 (1957).

ARGUMENT VII

There is even evidence that the choice of the practice of law is a fundamental right. In re Griffiths, 413 US 717 (1973) cites Truax v. Raich, 239 US 33, 35 (1915) holding that the right to the choice of occupations "is the very essence of personal freedom."

"...The practice of law should be considered a fundamental right." The Supreme Court Of New Hampshire v. Pi-

per, 470 US 274, 283 (1985).

In Zauderer v. Office of Discipline, Superior Court of Ohio, 471 US 626 (1985) the plaintiff was accorded the fundamental right to advertise his law practice under the First Amendment. His case received strict scrutiny.

In conclusion, I ask this Court to remand this case with instructions to grant a full judicial hearing on the grading of my two contested exams, or to remand with a suggestion that they admit me to their bar.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

John J. Scinto

John J. Scinto, Petitioner
101 Mill River Dr, Stratford, CT06497
(203)375-8596 June 2, 1993

93-40

No.

Supreme Court, U.S.
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In The Supreme Court of The United States
Spring Term, 1993

John J. Scinto, Petitioner Pro Se

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R. David Stamm, et al
Respondents

APPENDIX

to

Petition for Writ of Certiorari to The Supreme Court of Connecticut

Respectfully submitted,

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95 pp

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APPENDIX

CONSTITUTIONAL PROVISIONS

US Const. amend. XIV, sec. 1:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

US Const. amend. V:

"...nor be deprived of life, liberty, or property, without due process of law..."

Conn. Superior Ct. Rules, sec. 143, Motion to Dismiss - Grounds:

"The motion to dismiss shall be used to assert (1) lack of jurisdiction over the subject matter..."

sec. 384, Summary Judgments - Judgment:

"The judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

NO. 26 85 33 SUPERIOR COURT -
JOHN J. SCINTO JUD. DIS. FAIRFIELD
v. AT BRIDGEPORT
R. DAVID STAMM, ET AL NOV. 27, 1990

MEMORANDUM OF DECISION

ABLE COPY

RE: MOTION TO DISMISS

The Administrative Director of the State Bar Examining Committee and the Bar Examining Committee, both of whom are named as defendants, seek dismissal of this proceeding on the ground this court lacks jurisdiction over the subject matter. They claim this court lacks jurisdiction because plaintiff, John J. Scinto, has failed to allege facts which overcome the bar of sovereign immunity and has failed to notify all persons having an interest in the matter. I have concluded that this court has jurisdiction over the plaintiff's due process claim. I have denied the Motion to Dismiss.

The plaintiff claims, among other things, that his due process rights were violated by the committee's making gross errors in grading his examination. He seeks a review of his bar examination

results. He also seeks a declaratory judgment that the grading system is unconstitutional. After reviewing the reports of the Supreme Court, I have determined that the portion of the plaintiff's complaint seeking a review of his essay examination is a petition requesting this court to exercise its supervisory powers over the Bar Examining Committee. Such proceedings are not actions or suits at law even though bar examining committees have often been carried as parties in the case titles. Heiberger v. Clark, 148 Conn. 177, 182-83 (1961). Since the proceeding is in the nature of petition as opposed to a suit against a state officer, the doctrine of sovereign immunity does not apply.

The defendants claim that all persons having an interest in the request for a declaratory judgment have not been

made parties or given proper notice as required by § 390(d) of the Practice Book. This court cannot render a declaratory judgment "until all persons directly concerned have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard...." Manafort Bros., Inc. v. Kerrigan, 154 Conn. 112, 114 (1966). Since the plaintiff's right to bring an action for a declaratory judgment involves the jurisdiction of the court to entertain the action, the jurisdictional issue may be raised at any time. Reilly v. Liquor Control Commission, 153 Conn. 242, 248 (1965). In an action for declaratory judgment , a plaintiff may cure the defect of parties and notice prior to the time of judgment. State ex rel. Kelman v. Schaeffer, 161 Conn. 522, 528 (1971);

United Oil Co. v. Urban Redevelopment Commission, 158 Conn. 364, 388 (1969).

The defendants contend that all those applicants who have recently taken the examination, as well as prospective applicants, should be given notice. The other applicants appear to be persons who have an interest in the subject matter even though their interests may not be adversely affected. Under Practice Book § 390(d), all persons having an interest in the subject matter should be made parties to, or given notice of, the action. See Salamandra v. Kozlowski, 173 Conn. 136, 138 n. 2 (1977). Since the plaintiff has a viable due process claim, this rule does not divest this court of jurisdiction. The plaintiff has requested various types of relief. While this court may not have the power to enter a declaratory judgment, it does have

jurisdiction over the plaintiff's due process claim that his examination was improperly graded. Hence, the suit can not be dismissed for lack of jurisdiction over the subject matter.

The defendants also claim that procedural due process has been satisfied because there is no restriction on the number of times an applicant may sit for the examination. Practice book §15A. Because this claim has been raised in the context of sovereign immunity, which I have determined to be inapplicable, I do not pass upon this claim at this time.

For the foregoing reasons, the Motion to Dismiss is denied.

/s/
George N. Thim, Judge

No. CV90 02685335 Superior Court
John J. Scinto J.D. of Fairfield
VS. at Bridgeport
R.David Stamm, et al Sept. 14, 1990

MOTION TO ADD FEBRUARY, 1990 BAR EXAM - INATION COUNT TO PETITION

The bar examination is part of a continuing investigation of the court to determine the fitness of the candidate to practice law. Feldman v. D.C.C.A., 410 U.S. 472 (1983). Plaintiff alleges that this exam grossly arbitrarily and capriciously infringed upon his constitutional right of due process and equal protection by its unfair grading. This was done in a manner similar to that which was used on his previous exam, which is the subject of his petition. Therefore, he asks this court to add the February, 1990 bar exam as a count to this petition.

Furthermore, since comparing his essay answers to several of those of other candidates receiving higher grades

is the best way to properly evaluate his competence on the essay exam, and since such essays should be made available under the best evidence rule, he asks the Bar Examining Committee to preserve them. A precedent was set for this when the Committee agreed to preserve all materials of the February, 1984 exam, after I had initiated suit on the February, 1983 exam. As was done then, all materials should be preserved including model answers of the professors and/ or other professionals who submitted essay questions; and including graders' notes; and the Committee's calibration notes and instructions. Plaintiff has already received copies of his answers and a sample answer booklet.

PLAINTIFF

/s/ _____

John J. Scinto, Plaintiff

No. CV 90 0268533S
JOHN J. SCINTO
VS.
R. DAVID STAMM, ET AL

SUPERIOR COURT
J.D. OF FAIRFIELD
AT BRIDGEPORT
SEPT. 21, 1990

OBJECTION TO PLAINTIFF'S MOTION TO ADD FEBRUARY, 1990, BAR EXAM COUNT

BACKGROUND

By Summons and Complaint with a return date of March 20, 1990, the plaintiff commenced an action against the State Bar Examining Committee (SBEC) and R. David Stamm, its Administrative Director, alleging that the system and methods used to grade the July, 1989 bar examination, which he had failed to pass, were arbitrary and capricious in violation of his right to due process.

On March 12, 1990, following a Show Cause hearing, the Court, Spear, J. ordered the SBEC to retain all exam materials related to the plaintiff from the July, 1989 exam, as well as the

ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

SBEC's Sample Answer booklet. (See Order, Attached as Exhibit A).

On March 29, 1990, the defendants filed a Motion to Dismiss on juisdictional grounds, and the plaintiff responded with a Memorandum in Opposition on July 19, 1990.[1/] Oral argument on this motion was heard by Judge Thim on August 20, 1990, and the matter is currently pending before him.

On September 14, 1990, the plaintiff filed the instant motion, in which he seeks to "add the February, 1990 bar exam as a count to this petition," and also apparently seeks to have the SBEC retain the essay exam booklets of other exam candidates who took the February, 1990 exam, plus additional exam materials. The plaintiff has not filed a proposed amended complaint.

1/ Briefs filed in connection with

this motion were as follows: Defendants' Brief in Support of Motion, filed March 29, 1990; Plaintiff's Brief in Opposition, filed July 19, 1990; Defendants' Reply Brief, filed August 10, 1990; Plaintiff's Addendum to Memorandum, filed August 20, 1990; Plaintiff's Opposition to Defendants' Reply Brief, filed August 27, 1990.

ARGUMENT

1. Request to add count relating to February, 1990 Bar Examination.

Although the plaintiff seeks to amend his complaint to add a count, he has not complied with P.B. sec. 176 governing such amendments. Specifically, he has not attached the proposed amended complaint to his motion. From his description of the proposed amendment, it appears that the plaintiff wishes to make the same allegations concerning the February, 1990 bar examination as he has made concerning the July, 1989 exam.

As has been noted, there is currently pending before the Court a Motion to Dismiss challenging the subject matter

jurisdiction of the Court. Once subject matter jurisdiction has been raised, no further action can be taken in the case until the jurisdictional issue has been resolved. Baldwin Piano and Organ Co., v. Blake, 186 Conn. 295, 297 (1982) (" ' Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it "can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction" ' ". (citations omitted); Park City Hospital v. Commission on Hospitals and Health Care, 14 Conn. App. 413, 417 (1988).

Especially in the present case, where numerous briefs were filed and lengthy oral argument was heard approximately one month ago, it would be unfair to permit an amendment if such an amendment would result in a delay of consid-

eration of the pending Motion to Dismiss.

However, if, as it appears, the plaintiff seeks to add no new substantive allegations to his complaint which would raise new legal issues, but merely seeks to apply the same allegations to the February, 1990 examination as he made against the July, 1989 examination, then the defendants would not object to the proposed amendment as long as it is agreed that the pending Motion to Dismiss would apply equally to the amended complaint. The legal arguments contained in the Motion to Dismiss would be the same regarding the February, 1990 exam as they were regarding the July, 1989 exam, if the allegations remain the same.

If the pending Motion to Dismiss is not to apply to the proposed new count, then the defendants object to the amendment under the authority of Baldwin

Piano as set out above.

2. Request that the SBEC retain essay answers of other exam candidates.

It is unclear from the plaintiff's motion which exam answer booklets he seeks to have the SBEC retain. The defendants have no objection to retaining Mr. Scinto's own essay answer booklets, grading sheets, and application forms, as well as the Sample Answer booklet compiled by the SBEC. However, if the plaintiff is requesting the defendants to retain all the essay answer booklets of all the exam candidates who took the February, 1990 exam, then the defendants object vigorously to this request.

More than five hundred candidates took the February, 1989 bar examination, and each one turned in at least twelve separate essay answer booklets. This means that the SBEC currently has over 6,000 essay booklets from the February

exam, as well as more than 18,000 essay booklets amassed during the recently taken July, 1990 exam. The plaintiff has already brought suit against the SBEC over the July, 1989 exam, which produced 18,000 exam booklets. Under SBEC policy, the exam booklets are destroyed 90 days after the results of an exam are released. Exam candidates are informed of the deadline, so they can request their own answer booklets if they wish to obtain copies of them.

In addition, the SBEC selects answers to each question throughout the grading range, one for each grade from one to seven, and compiles them in a Sample Answer Booklet which is available to applicants upon request and payment of a fee. The plaintiff in this case has acknowledged that he has already received copies of his answers to the February, 1990 essay exam, as well as the Sample

Answer booklet.

After the ninety day period has expired, tha SBEC destroys the exam booklets. The reason for this is primarily logistical. Approximately 25, 000 exam answer booklets are generated each year, as well all the paper work which goes into evaluating an applicant's admission to the Bar: applications, references, transcripts, exam questions, grading sheets, etc. for each of the two thousand or more applicants who take the bar examination each year.

Further, once one exam is completed, the SBEC must begin gearing up for the next exam, accumulating the massive amounts of paperwork involved in that proceeding. It is impossible for the SBEC to retain all the answer booklets indefinitely.

In the present case, the plaintiff has brought suit against the SBEC challenging

the July 1989 exam. In an earlier proceeding in the case, on March 12, 1990, Judge Spear declinedto order the SBEC to retain all answer booklets for that exam, order instead that the SBEC retain only answer booklets and materials relating to the plaintiff, as well as the Sample Answer booklet. (See order, Exhibit A attached). Now the plaintiff seeks to add the February 1990 exam to his complaint, and seeks the preservation of exam answer booklets relating to that exam. It is clear that some people fail each bar examination that is given. If the SBEC were required to keep all the thousands of booklets for each exam whenever a failing candidate challenged it or sought to compare his answers with all others, the SBEC would be buried under the mass.

Because it would be extremely burdensome to keep all the exam booklets of

all the applicants to the February exam, and because, since the plaintiff already has in his possession a copy of his own answer booklets and the Sample Answer Booklet compiled for that exam, it is unnecessary to his case to keep them all, the defendants object to the plaintiff's request. The defendants have no objection to retaining all of the plaintiff's own records, answer booklets, and grading sheets throughout the pendency of this litigation.

THE DEFENDANTS

BY CLARINE NARDI RIDDLE
ATTORNEY GENERAL

/s/
Carolyn K. Querijero
Assistant Attorney General

CV -90 026 85 33 S
JOHN J. SCINTO, Plaintiff,
vs.
DAVID R. STAMM, ADM. DIR. ET AL, Defendant

SUPERIOR COURT
JUDICIAL DISTRICT
OF FAIRFIELD
AT BRIDGEPORT
October 9, 1990
Short Calendar

BEFORE
THE HONORABLE MARTIN L. NIGRO, JUDGE

THE COURT: The next one that was marked ready is number 178, Scinto vs. Stamm.

MS. QUERIJERO: Yes, your Honor. It's ready.

THE COURT: Who are you representing?

MS. QUERIJERO: Your Honor, my name is Carolyn Querijero. I'm Assistant Attorney General. I'm representing the defendants, David Stamm and the Connecticut Bar Examining Committee. And it's my objection to the plaintiff's Request to Amend.

THE COURT: And you're Mr. Scinto?

MR. SCINTO: Yes, your Honor.

THE COURT: Do you have the motions?

Well, so I hit the first step first, would you agree that the Motion to Dismiss currently pending would be made applicable to this exam, as well as to the other exam?

MR. SCINTO: I would agree to that part, yes, your Honor.

THE COURT: All right.

MS. QUERIJERO: Your Honor, in that case I wouldn't have any problem, as long as the same Motion to Dismiss will apply to the --

THE COURT: All right. In line of the agreement of parties, the objection is overruled.

THE COURT: Yes.

MS. QUERIJERO: --because the subject matter --

THE COURT: That might be a controlling issue and then the supplementary. So, I will direct then in accordance with this, that the objection is overruled because the Motion to Dismiss, by agreement of the parties, would be made applicable to the February 1990 Bar examination. We haven't added a count. I assume the count would be the same.

In addition, the State is directed to preserve the items indicated, the model answers, the sample answers, and the notes if they exist, prepared by the graders.

MS. QUERIJERO: And that's relating to Mr. Scinto's exam?

THE COURT: Right. Plus the other item that he indicated --

MR. SCINTO: Calibration notes.

THE COURT: -- the calibration notes.

MS. QUERIJERO: Calibration notes. Okay. Thank you, your Honor.

MR. SCINTO: Thank you, your Honor.

(WHEREUPON THE HEARING WAS CONCLUDED)

NO. CV90 26 85 33 SUPERIOR COURT
JOHN J. SCINTO JUD. DIS. FAIRFIELD
v. AT BRIDGEPORT
R. DAVID STAMM, ET AL SEPT. 11, 1991

MEMORANDUM OF DECISION
RE: MOTION TO CORRECT (#123) AND
MOTION FOR DISCOVERY (#126)

The plaintiff's motions to correct the transcript of the court proceedings of October 20, 1990 (pleading number 123) and for discovery (pleading number 126) are denied.

At the October 20th hearing, the parties set forth legal arguments with respect to a motion to dismiss. The court reporter prepared a transcript of the proceeding which she certified as being a true and accurate transcription of her stenographic notes. The plaintiff now states that he knows the transcript is inaccurate because he read from his brief on October 20th and all the words and citations in his brief do not appear in the transcript.

The plaintiff has not shown the transcript is inaccurate. He has, however, shown that he will not be prejudiced by any inaccuracy or omission since his brief on the motion to dismiss is contained in the court file.

/s/
THIM, JUDGE

No. 268533
JOHN J. SCINTO
V.
R. DAVID STAMM, ET AL

SUPERIOR COURT
J/D OF FAIRFIELD
AT BRIDGEPORT
DEC. 2, 1991

BEFORE
HON. WILLIAM J. MC GRATH, JUDGE

(PAGE 23)

THE COURT: Well, as I said to you, you know, it's a hard decision, but if you're one point below--but if they allowed you to come in then the one person who was a point below you would say, "Well, why shouldn't I? I'm only one point below him." And it could go on--

MR. SCINTO: --It's been done as a practice, your Honor. It was done informally, with informal hearings. It's been done a number of times. The defense seeks at this time to eliminate this practice, it's a longstanding practice.

THE COURT: Well, you're lucky, you get to know what it is that you said and how it's graded;...

NO. CV90 26 85 33 SUPERIOR COURT
JOHN J. SCINTO JUDICIAL DISTRICT OF
v. FAIRFIELD AT BRIDGEPORT
R. DAVID STAMM JANUARY 13, 1992

MEMORANDUM OF DECISION
SUMMARY OF JUDGMENT
NOS. #120 & #135

Before the Court are the Summary Judgment motions, one by the plaintiff (#135) and the other by the defendant (#120).

The following facts are relative to the decision in this matter.

The pro se plaintiff, John Scinto, sues R. David Stamm, the administrative director of the Connecticut Bar Examining Committee ("CBEC"), and the Connecticut Bar Examining Committee itself for allegedly unconstitutional grading procedures regarding the Connecticut Bar Examination. The following undisputed facts are taken from the pleadings, exhibits and affidavits.

The plaintiff failed the July, 1989

and February, 1990 Connecticut Bar Examinations. The plaintiff received a score of 262.79 on the July, 1989, exam and 260.37 on the February, 1990 exam.

The grading procedures employed by the CBEC as attested to by the defendant Stamm, are as follows: The purpose of the bar exam is to test the minimal competency of a candidate to practice law in Connecticut. "The present system of grading the essay portion of the exam involves multiple graders per question, calibration of graders, conversion of essay grades to the Multi-State Bar Examiniation ("MBE") scale, and a review of all applicants whose total scores are within 10 points of the passing score." Stamm affidavit, p.4. He attests that for the July, 1989 exam, three graders were assigned to each essay question and each grader initially read one-third of the answer booklets for that question.

Id., p. 6. For the February, 1990 exam, one of two graders initially read one-half of all the answers for that question. Id. "A candidate whose total score after the first reading of the essay portion falls within 10 points of the the total passing score (264) has all his essay answers reread and graded by a different grader." Id., p.7. If the two readings result in the same grade on a particular question, that grade becomes final. Id. If the two grades given differ by one point, the average of the two becomes the final grade for that answer. Id.

If the two grades differ by more than one point, then the essay is read by a third reader and a consensus grade based on the three separate grades becomes final for a particular answer. Id.

Prior to the initial reading of an essay answer, the graders assigned to a

particular question meet to calibrate a grading scale for that question. Id., p.5. "The graders develop this grading scale in a process during which they read and analyze approximately fifty answer booklets, considering the analysis provided by the drafter of the question, their own legal analysis, and their knowledge of the relevant law." Id., p. 6.

Stamm further attests that "(t)his basic system of grading is presently in use in a majority of the states, and is considered state of the art." Id.p.4. "The passing score of 264 on the MBE scale was set after consultation with testing experts, and is based on the historical average passing score for Connecticut bar applicants on the MBE portion of the exam." Id., p.3. Stamm attests that these procedures were followed in grading the plaintiff's bar examination

essay answers in question. Id., pp.8-9

In his complaint, the plaintiff seeks: a hearing by the court on the essay portion of the exam, admission to the Bar, a declaratory judgment that the bar exam rules and regulations are unconstitutional, and a declaratory judgment requiring the examiners to change their grading procedure.

The plaintiff alleges that he deserved to be given more points on certain essays, and that the CBEC's customs, grading procedures and rules result in gross grading errors that unconstitutionally violate due process gurantees under the federal and state constitutions.

The defendants answered the complaint and asserted sovereign immunity as a special defense. (The court, Thim, J., earlier denied the defendant's motion to dismiss based on sovereign immunity.) The plaintiff answered the spe-

cial defense, thereby closing the pleadings. See Practice Book sec. 379. The parties have filed memoranda of law in support of their respective motions and in opposition to the other party's motion.

This court heard the parties' arguments on the cross-motions for summary judgment on November 4, 1991, and on December 2, 1991.

"Summary judgment is a method of resolving litigation when pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wilson v. New Haven, 213 Conn. 277, 279, 567 A.2d 829 (1989); see also Practice Book sec. 384. "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to

determine whether any such issues exist." Nolan v. Borkowski, 206 Conn. 495, 500, 538 A.2d 1031 (1988).

I

Plaintiff's Motion For Summary Judgment

In support of his motion for summary judgment, the plaintiff argues that based on his "allegations... other motions, evidence, memoranda, facts and law," he is entitled to summary judgment. The defendants argue in opposition that the plaintiff has failed to submit evidence sufficient to satisfy his burden of proof.

The plaintiff submits his own affidavit and copies essay questions and his answers. It is submitted that plaintiff's affidavit merely repeats in conclusory form the criticisms of the CBEC's grading procedures that he makes in his pleadings and memoranda. The plaintiff has not submitted any evidence to support

his allegations that the CBEC's procedures resulted in gross grading errors. Further, the plaintiff submits no evidence to rebut the defendant's affidavit as to the procedures employed to grade the plaintiff's exams.

It is also submitted that the plaintiff is not entitled to the relief he seeks--admission to the bar, a court hearing on his essay answers, and a declaratory judgment--as a matter of law, as will be discussed shortly.

It is therefore found that the plaintiff is not entitled to summary judgment on his complaint as a matter of law.

II

Defendant's Motion for Summary Judgment

In support of their motion for summary judgment, the defendants argue that (1) the CBEC's bar examination grading procedures do not, as a matter of law, offend due precess principles; (2) the

plaintiff is not entitled to the relief he seeks, i.e., a court hearing; (3) the plaintiff has failed to give proper notice as required by the declaratory judgment rules in the practice book; and (4) sovereign immunity bars this action.

In opposition, the plaintiff reiterates the arguments he makes in support of his summary judgment motion.

A. Due Process

"A State cannot exclude a person from the practice of law...in a manner or for reasons that contravene the Due Process... Clause of the Fourteenth Amendment.... A State can required high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualifications must have a rational connection with the applicant's fitness or capacity to practice law." Schware v. Board of Bar

Examiners, 353 U.S. 232, 238-39, 1 L. Ed 2d 796, 77 S. Ct. 752 (1957).

1. Grading Procedures

The plaintiff alleges that the CBEC's grading procedures violate due process because the "system is obviously and grossly arbitrary and capricious in that it does not permit a grader to give a grade of minimal competency or barely passing on any answers, although the examination purports to test minimal competency."

Courts have uniformly held that state bar examination procedures do not violate due process principles. Annotation, State Bar Examination Procedures, 30 A.L.R. Fed 934, 937 (1976 & Supp. 1991). Courts generally employ a rational basis test to determine whether a grading procedure is constitutional

"(T)he focus of the rational relationship test is not whether the state

has superior means available to accomplish its objectives, but whether the means it has chosen is a reasonable." Tyler v. Vickery, 517 F.2d 1089, 1102 (5th Cir. 1975), cert. denied, 426 U.S. 940 (1976).

The plaintiff has not submitted any evidence to show how the grading procedures are unreasonable. He makes that conclusion based on his own speculation that he deserves to be admitted to the bar because he should have received more points on certain essay answers.

In Tyler v. Vickery, supra, the court held that the Georgia Bar Exam, consisting of the Multi-State Bar Exam and essay questions, is "designed soley to assess the legal competence of bar examinees." Vickery, supra, 1102. Therefore, it is a "rationally supportable examination" because it is "designed for the purpose

for which it is being used, and... utilize(s) a cutoff score related to the quality the examination purports to measure." Id. Accord McGinn v. State Bar Board, 399 N.W. 2d 864, (N.D. 1987).

It is clear that tha plaintiff has not met his burden of rebutting the facts set forth in the defendant Stamm's affidavit. See Cummings and Lockwood v. Gray, 26 Conn. App. 293, 298.___A.2d___ (1991). Bar examinations which test minimal competence to practice law are, as a matter of law, rationally related to a state's interest in licensing competent attorneys. Therefore it is found that the plaintiff's due process argument regarding the CBEC's grading proeedures must fail in that he has not sustained hia burden of rebutting the facts presented by the defendants.

2. Court Hearing

In his prayer for relief, the plain-

tiff requests the court to grant him a hearing on his essay answers and thereafter admit him to the Bar. The defendants argue in support of summary judgment that the plaintiff is not entitled to this relief as a matter of law.

Although Connecticut requires the court to hold a hearing when a bar applicant is denied admission by a character committee, In Re Application of Dinan, 157 Conn. 67, 72, 244 A.2d 608 (1968), no analogous right exists upon failure of the actual bar examination.

Other courts have refused to review an applicant's essay answers absent allegations or a showing that the applicant failed because of fraudulent conduct by the bar examiners. See Staley v. State Bar of California, 109 P.2d 667, 668 (Cal. 1941); Bowens v. Board of Law Examiners, 291 S.E.2d 170, 172 (N.C. App. 1982); Petition of Pacheco, 514 P.2d

1297, 1300 (N.M. 1973). Also, some courts have held that a post-examination hearing by a court is neither constitutionally necessary nor practical. See Lucero v. Ogden, 718 F.2d 355, 358-59 (10th Cir. 1983) cert denied, 465, U.S. 1035 (1984) (post-exam hearing would not be any more effective than reexamination, and challenging particular essay answer grade is beyond scope of bar exam review by court); Tyler v. Vickery, supra, 1103 (post-examination hearing not constitutionally required); Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 477 (7th Cir. 1974) (ability to retake Illinois bar exam unlimited number of times makes court hearing and other procedures unnecessary; Singleton v. Louisiana, 413 F. Supp. 1092, 1098 n. 14 (E.D. La. 1976) (post-examination not constitutionally required); In re Mead, 361 N.E. 2d 403, 405-06

(Mass.), cert. denied, 434 U.S. 858 (1977) In Re McGinn, supra, 867 (court's function is not to regrade bar exam. answers).

Connecticut allows applicants an unlimited number of chances to retake the bar exam. Practice Book sec. 15A. It is found that this unlimited reexamination right plus the automatic review by the CBEC of bar examinations within ten points of the minimum passing score satisfy due process requirements as a matter of law based upon the above cases. It is therefore found that the plaintiff is not entitled to a post-examination hearing in court.

B. Declaratory Judgment

The plaintiff seeks a declaratory judgment that the CBEC's rules and regulations are unconstitutional and that the grading procedure should be changed.

The defendants argue that the plaintiff is not entitled to a declaratory judgment because he has failed to give notice to all interested parties as required by Practice Book sec. 390(d). Practice Book sec. 390 provides in relevant part: "The court will not render declaratory judgments upon the complaint of any person:...(d)unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof."

"Compliance with the requirement of sec. 390(d)...has been regarded by this court as essential to the jurisdiction of a court to render declaratory judgment." Connecticut Insurance Guaranty Ass'n v. Raymark Corp., 215 Conn. 224, 229, 575 A.2d 693 (1990).

It is noted that at a minimum, unsuccessful bar applicants would be interested in this suit and in the remedy if

the plaintiff were successful. In Pierce v. Zoning Board of Appeals, 7 Conn. App. 632, 509 A.2d 1085 (1986), the court defined those who would be interested in the subject matter of the declaratory judgment complaint as all "(t)hose members of the general public who might be able to establish classical aggrievement." Id., 637. A person is classically aggrieved when he or she has a specific, personal legal interest in the subject matter of the decision and this specific interest has been specially and injuriously affected. Id., 636. It is clear that unsuccessful bar applicants would have a specific legal interest in a decision ruling the CBEC's grading procedures unconstitutional. It is found that neither the plaintiff's declaratory judgment complaint nor his affidavit evidence any attempt to notify these unsuccessful applicants or anyone else of

this suit. Therefore the plaintiff has not complied with Practice Book sec. 390(d)and, therefore, this court lacks subject matter jurisdiction to render the relief the plaintiff requests.

It is found that, as a matter of law, the plaintiff is not entitled to the relief he seeks. Accordingly the plaintiff's motion is denied. The defendant's motion is granted.

/s/
WM. J. MCGRATH, JUDGE

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 14538

JOHN J. SCINTO

v.

R. DAVID STAMM ET AL. :MARCH 4, 1993

ORDER

THE MOTION OF THE PLAINTIFF, FILED FEBRUARY 18, 1993, FOR EN BANC RECONSIDERATION OF DECISION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/

CHIEF CLERK

STATE OF CONNECTICUT
SUPREME COURT

NO. SC 14538 224CONN. 524

JOHN J. SCINTO

v.

R. DAVID STAMM, ET AL

Argued November 5, 1992-decision released February 9, 1993

CALLAHAN, BORDEN, BERDON, SANTANIELLO, and F.X. HENNESSY, Js.

The plaintiff, who had received a failing grade on the state bar examination, sought a declaratory judgment to determine the constitutionality of the grading procedures used by the defendant bar examining committee. The trial court denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment. From the judgment against him, the plaintiff appealed. HELD:

1. The trial court properly denied the

plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment; contrary to the plaintiff's claim that the grading procedures employed by the defendants are arbitrary and capricious and therefore violated his due process rights, the defendants' grading procedures have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law.

2. The plaintiff's claim to the contrary notwithstanding, there is no constitutional right to a judicial hearing for the purpose of regrading an unsuccessful applicant's answers on the essay portion of the bar examination; the right to retake the examination provides adequate procedural protection.

(One Justice dissenting)

Action for declaratory judgment

to determine the constitutionity of the defendants' grading procedures for the state bar examination, and for other relief, brought to the superior court in the judicial district of Fairfield, where the court, McGrath, J., denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. Affirmed.

John J. Scinto, pro se, the appellant (plaintiff).

Carolyn K. Querijero, assistant attorney general, with whom, on the brief, was Richard Blumenthal, attorney general, for the appellees (defendants).

BORDEN, J. The principal issues in this appeal are: (1) whether the grading procedures of the Connecticut bar examining

committee are arbitrary and capricious and therefore violate due process of law; and (2)whether a bar applicant who receives a failing score on the bar examination is entitled to a judicial hearing for the purpose of regrading the applicant's anwers on the essay portion of the examination. The plaintiff, John J. Scinto, appeals from the judgment of the trial court denying his motion for summary judgment and granting the motion for summary judgment of the defendants, the Connecticut bar examining committee, and R. David Stamm, its administrative director.[1] We affirm the judgment of the trial court.

The relevant facts and procedural history are as follows. In July, 1989, the plaintiff took the Connecticut bar examination and received a failing score of

[1] The plaintiff appealed from the

judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book sec. 4023 and General Statutes sec. 51-199 (c).

262.79, which was below the standard passing score of 264.[2] The defendant

[2] The defendant had failed the exam on at least two occasions prior to the July, 1989 exam. He does not contest, however, the procedures for grading his examinations on the occasions prior to the July, 1989 examination.

then took the February, 1990 bar examination but again failed, receiving a score of 260.67. The plaintiff thereafter filed this petition in Superior Court seeking, inter alia: (1)a judicial hearing for the purpose of regrading his essay answers for the July, 1989 bar examination; (2)an injunction ordering the defendants to admit him to the Connecticut bar; and (3)a declaratory

judgment that the defendants' regulations governing admission to the bar are invalid because they violate the due process clauses of the federal and state constitutions.

The defendants moved to dismiss the plaintiff's petition on the grounds that the court lacked subject matter jurisdiction because: (1) the doctrine of sovereign immunity barred the plaintiff's claims; and (2) the plaintiff's request for a declaratory judgment did not comply with Practice Book sec, 390 (d)[3]

[3] Practice Book sec. 390 provides in relevant part: "The court will not render declaratory judgments upon the complaint of any person...(d) unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof."

since proper notice had not been given to other interested parties. While this motion was pending, the plaintiff moved for permission to amend his petition by adding a claim arising out of his failure to pass the February, 1990 bar examination.

The trial court, Thim, J., subsequently denied the defendants' motion to dismiss, ruling that the doctrine of sovereign immunity did not bar the plaintiff's claims and that the court had subject matter jurisdiction over the declaratory judgment claim because the plaintiff, pursuant to State ex rel. Kelman v. Schaffer, 161 Conn. 522, 528, 290 A.2d 327 (1971), was entitled to cure the lack of notice prior to a final judgment. The defendants then filed an answer to the plaintiff's petition denying all of the plaintiff's claims.[4] The defendants

4 The plaintiff claims that, because the defendants' answer does not deny his allegations that he passed the February, 1990 bar examination, he was entitled to a summary judgment on that claim. Although the trial court did not address this issue in its memorandum of decision on the motions for summary judgment, the plaintiff's claim is without merit.

The plaintiff never filed an amended petition to include the February, 1990 bar examination. Consequently, when the defendants filed their answer to the plaintiff's petition, they responded to all of the allegations contained in the petition. That petition asserted claims related to the July, 1989 examination only and, therefore, the defendants could not have answered a claim regarding the February, 1990 examination that was not included in that petition.

also asserted, by way of special defense, that the doctrine of sovereign immunity barred the action because "the allegations of the complaint do not clearly demonstrate an incursion upon constitutionally protected interests." The plaintiff then moved to strike the defendants' special defense, and subsequently the trial court, Thim J., denied the motion.

Both sides moved for summary judgment. The trial court, McGrath, J., denied the plaintiff's motion summary judgment and granted the defendants' motion for summary judgment. The trial court concluded that: (1) the grading procedures employed by the defendants were not arbitrary or capricious and therefore do not violate due process; (2) the plaintiff was not constitutionally entitled to a judicial hearing for the pur-

pose of regrading his answers to the essay portion of the bar examination; and (3) the trial court lacked subject matter jurisdiction over the declaratory judgment aspect of the plaintiff's claim because the plaintiff had not attempted to notify any interested parties pursuant to Practice Book sec. 390 (d). On appeal, the plaintiff claims that the trial court improperly: (1) concluded that the grading procedures of the defendants are not arbitrary and capricious and therefore do not violate due process; (2) concluded that he was not constitutionally entitled to a judicial hearing for the purpose of regrading his answers to the essay portion of the examination; and (3) denied his motion to strike the defendants' special defense.[5]

[5] The plainfiff also appears to claim in his reply brief that the trial court improperly concluded that it lacked subject

matter jurisdiction over the plaintiff's declaratory judgment claim. Absent exceptional circumstances, we will not review claims raised for the first time in an appellant's reply brief. See Adolphson v. Zoning Board of Appeals, 205 Conn. 703, 716, 535 A.2d 799 (1988); Clark v. Gibbs, 184 Conn. 410, 420, 439 A.2d 1060 (1981). An appellant's failure to raise a claim until its reply brief does not give the appellee a proper opportunity to respond. DeLucia v. Burns, 11 Conn. App. 439, 444, 527 A.2d 1234, cert. denied, 205 Conn. 803, 531 A.2d 935 (1987). We therefore conclude that this issue is not properly before the court.

I

The plaintiff first claims that the trial court improperly denied his motion for summary judgment and improperly granted the defendants' motion for summary judgment because the grading procedures of the defendants are arbitrary and capricious and therefore violate his due process rights. We disagree.

In July, 1982, after several years of consultation with nationally recognized bar examination experts, the defendants extensively revised the format of the Connecticut bar examination. As revised, the examination consists of two parts: a multiple choice portion, administered in most states and known as the Multistate Bar Examination (multistate), consisting of two hundred questions;[6] and

[6] The answers to the multistate are scored by computer. The raw score

equals the number of questions answered correctly out of the two hundred questions. The Multistate Bar Examining Committee then scales the raw score to compensate for any degree of difficulty of the test in comparison to prior administrations of the multistate in previous years. The defendants use the multistate scaled score in calculating an applicant's total score for the Connecticut bar examination.

an essay portion consisting of twelve questions. The examination as a whole is designed to test the minimal competency of a candidate to practice law in Connecticut. The present system was designed to standardize passing scores, provide for consistency in grading and to protect against idiosyncratic grading and grading errors. There is no passing or failing score on either portion of the examination.

Grading of the essay answers is done so that the graders do not know the identity of the applicant whose answers they grade. Answers to the essay questions are graded on a scale from zero to seven. In most instances, all of the examination booklets containing the answer to one of the twelve questions are distributed among three graders.[7] Each

[7] The Connecticut bar examination is

administered twice a year: once in February and once in July. Because the number of candidates that sit for the February examination is significantly lower than the number that sit in July, the defendants sometimes assign only two graders to a particular essay question on the February examination.

grader assigns a score to one third of the answer booklets. In order to ensure uniformity and consistency in grading essay answers, the three graders for a particular question meet, prior to grading the essay questions, to develop a model answer and to agree upon the weight to be assigned to each component of the answers.

A candidate's multistate score is added to the candidate's converted score[8]

[8] The defendants use a complex mathematical formula to convert the essay scores to the multistate scale. The formula is as follows:

SS = Xb + Sb/Sa (Rs - Xa) where

SS = Essay examination score on the multistate scale.

Xb = Average Connecticut applicant's multistate score.

Sb = Standard deviation of Connecticut applicant's multistate score.

Sa = Standard deviation of essay portion raw scores.

Rs = Applicant's essay portion raw score.

Xa = Average essay portion raw score.

on the essay portion of the examination to determine the total score. To pass the examination a candidate must attain a total score of 264. If a candidate's total score is within ten points, plus or minus, of the passing score, the essay portion of the examination is re-graded by a different grader. If this second grader assigns the same score as the previous grader for a particular question, then that score becomes the final score for that question. If the scores of the two graders differ by only one point, then the two scores are averaged. If the two scores differ by more than one point, then the two graders read the answer for a third time and agree upon the final score for that question. If a candidate's score after this process is 264 or greater, then the candidate has passed the examination, and

conversely, a candidate receiving a score below 264 has failed the examination. There is no limitation to the number of times a candidate who has received a failing score may retake the examination.

"The standard of review of a trial court's decision to grant a motion for summary judgment is well established. Pursuant to Practice Book sec. 384, summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact; D.H.R. Construction CO. v. Donnelly, 180 Conn. 430, 434, 429 A.2d 908 (1980);

a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. Practice Book Sections 380,381; Burns v. Hartford Hospital,[192 Conn. 451, 455, 472 A.2d 1257 (1984)] . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the non-moving party. Town Bank & Trust Co. v. Benson, 176 Conn. 304, 309, 407 A.2d 971 (1978). Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 317, 477 A.2d 1005 (1984)...." (Internal quotation marks omitted.)Connecticut Bank & Trust Co. v. Carriage Lane Associates, 219 Conn. 772, 780-81, 595 A.2d 334 (1991).

In light of the similarity of issues raised in the two motions for

summary judgment, we consider the trial court's disposition of the motions together. The plaintiff, in support of his motion for summary judgment and in opposition to the defendants' motion for summary judgment, filed memoranda, copies of the essay examination questions and his answers, and a personal affidavit. The substance of these documents can be distilled in two particular claims: (1) that his essay answers were scored by impermissibly subjective grading standards that resulted in gross grading errors; and (2) that because he received a score that was close to a passing score, there is no substantial difference between his failing score and a passing score, and thus the defendants arbitrarily and capriciously concluded that he was not minimally competent to practice law in Connecticut.

The United States Supreme Court's decision in Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 1 L. Ed. 2d 796 (1957), established the appropriate standard by which to analyze the plaintiff's claim. "A State cannot exclude a person from the practice of law ...in a manner or for reasons that contravene the Due Process... Clause of the Fourteenth Amendment.... A State can require high standards of qualification, such as good moral or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." (Emphasis added.) Id.; Scott v. State Bar Examining Committee, 220 Conn. 812, 820, 601 A.2d 1021 (1992).

The plaintiff, pursuant to his motion for summary judgment, had the heavy burden of establishing that the grading procedures employed by the defendants are arbitrary and capricious and that they have no rational connection to achieving the legitimate state interest of requiring minimal competency to practice law. See, e.g., Tofano v. Supreme Court of Nevada, 718 F.2d 313, 315 (9th Cir. 1983); Tyler v. Vickery, 517 F.2d 1089, 1101, (5th Cir.1975), reh. denied, 521 F.2d 815 (5th Cir.), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976); Chaney v. State Bar of California, 386 F.2d 962, 964 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S.Ct. 1262, 20 L. Ed.2d 162 (1968); McGinn v. State Bar Board of North Dakota, 399 N.W.2d 864, 867 (N.D. 1987); Petition of Wayland, 510 P.2d 1385,

1387 (Okla. 1973). Courts have uniformly held that an examination consisting of essays is not overly subjective, and is a rational method of assessing a candidate's competency to practice law. See, e.g., Tofani v. Supreme Court of Nevada, supra; McGinn v. State Bar Board of North Dakota, supra; Dinger v. State Bar Board of North Dakota, 312 N.W.2d 15, 18 (N.D. 1981). Likewise, a state is entitled to establish a minimum score for passing a bar examination without offending due process. In re Fischer, 425 A.2d 601, 602 (Del. 1980); Dinger v. State Bar Board of North Dakota, supra; Petition of Pacheco, 85 N.M. 600, 604, 514 P.2d 1297 (1973); see also Bailey v. Board of Law Examiners of Texas, 805 F. Sup. 106, 108 (W.D. Tex. 1980).

The trial court concluded that "[t]he plaintiff has not submitted any evidence

to support his allegations that the [defendants'] procedures resulted in gross grading errors. Further, the plaintiff submits no evidence to rebut the [defendants'] affidavit." We agree. Nowhere in his supporting documentation does the plaintiff offer anything but his own opinion and conclusions, based primarily on unsworn factual assertions-contained not in his affidavit, but in his accompanying memoranda, that the grading procedures used by the defendants were unfair. Unsworn assertions of fact, summary conclusions of law and unsupported allegations in an affidavit do not entitle a party to a summary judgment. See, e.g., Bartha v. Waterbury House Wrecking Co., 190 Conn. 8,12, 459 A.2d 115 (1983); Rathkopf v. Pearson, 148 Conn. 260, 264, 170 A.2d 135 (1961) ("[a]n allegation setting forth no evidentiary

facts avails nothing").

The plaintiff failed to offer evidence that setting the passing score at 264 is arbitrary or capricious. The defendants' affidavit in support of their motion for summary judgment , moreover, stated that they arrived at the passing score only after extensive consultation with testing experts. Similarly, the plaintiff, instead of offering that the defendants' system of grading somehow does not conform to accepted and sound nationwide methods of scoring bar examinations, offered only his opinion that his answers to several of the essay questions should have received higher scores.

The defendants' extensive affidavit meticulously described the current format of the bar examination, its procedural safeguards and its provision for multiple review of examinations falling

within ten points of the passing score. The affidavit set forth a carefully crafted system that is, in fact, designed to reduce the likelihood of any capricious or idiosyncratic scoring by an individual grader. Each answer is compared to the model answer created by three graders at a calibration session, and an answer may be read up to two additional times if the answer is part of an examination whose score falls within ten points of the passing score, and if there is any disagreement as to the proper score for that answer.

According to the undisputed contention of the defendants, this system is "state of the art" and is currently in use in most states. Courts have uniformly upheld grading systems such the defendants' that offer multiple protections from arbitrary grading. See, e.g., Tyler v.

Vickery, supra, 1105; Singleton v. Louisiana State Bar Assn., 413 F. Sup. 1092, 1099-1100 (E.D. La. 1976); In re Application of Bettine, Docket No. S-4985 (Alasks Nov. 13, 1992); Mississippi Board of Bar Admissions v. Appli-F., 582 So. 2d 377, 384 (Miss.), cert. denied sub nom. Zebert v. Mississippi Board of Bar Admissions, U.S. , 112 S. Ct. 591, 116L. Ed. 2d 616 (1991); Loeb v. New York State Bar Board of Law Examiners, 144 App. Div. 2d 813, 534 N.Y.S. 2d 559 (1988); McGinn v. State Bar Board of North Dakota, supra; Dinger v. State Bar Board of North Dakota, supra, 16; Hooban v. Board of Governors of Washington State Bar Assn., 85 Wash. 2d 774, 539 P. 2d 686 (1975), appeal dismissed, 424 U.S. 902, 96 S. Ct. 1092, 47 L. Ed. 2d 306 (1976); and other cases cited in annot., Validity, Under Federal Consti-

tution, of State Bar Examination Procedures, 30 A.L.R. Fed. 934 (1976 & Sup. 1992). Under these circumstances, we conclude that the grading procedures employed by the defendants have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law. Consequently, the trial court properly denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment.

II

The plaintiff next claims that the trial court improperly denied his motion for summary judgment and improperly granted the defendants' motion for summary judgment because he is constitutionally entitled, as a matter of procedural due process,[9] to a judicial

9 Although the plaintiff purports to

rely on both the federal and state constitutions, he has failed to brief or analyze independently any state constitutional provision. Consequently, we limit our discussion to the relevant federal constitutional claim. State v. Joly, 219 Conn. 234, 258 n.16, 593 A.2d 96 (1991).

The fourteenth amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law...."

hearing for the purpose of regrading his answers on the essay portion of the bar examination. We disagree.

The United States Supreme Court set forth Three factors to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L.

Ed. 2d 18 (1976). "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." Id., 335.

Application of the Mathews test to the present case compels the conclusion that a judicial hearing to regrade the applicant's essay answers is not constitutionally required. Admittedly, under the first prong of Mathews, an applicant has a strong interest in pursuing his chosen profession. Tyler v Vickery, supra, 1104. An individual does not have, however, an absolute right to practice law. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); Jones v. Board of Commissioners of Alabama State Bar, 737 F. 2d 996, 1002 (11th

Cir. 1984). Whether the applicant's interest is of sufficient weight to compel the requested relief can be determined only by analyzing the second and third prongs of Mathews. Lucero v. Ogden, 718 F. 2d 355, 358-59 (10th Cir. 1983), cert. denied, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984).

The applicant's interest "militates... in favor of a hearing only if hearings are [a] demonstrably more efficacious means of safeguarding that interest than" the other procedural protections that the defendants currently provide. Tyler v. Vickery, supra, 1104. In the present case, there is no evidence that the defendants' grading system is not effective in revealing grading errors or that it inadequately guards against the risk, if any, of an erroneous deprivation of an applicant's interest.[10] On the con-

trary, there is uncontroverted evidence that the defendants' system of grading, by providing multiple rereadings of examinations that fall within ten points of a passing score, effectively protects against against idiosyncratic or arbitrary grading. Although the grading of any essay examination may involve some inherent subjectivity, the potential capriciousness of any one grader is significantly reduced by: (1) the use of examination numbers to protect the identity of the applicant ; (2) the use of a model answer by which to measure an applicant's answer; (3) the regrading of any examination that falls within ten points of passing; and (4) the consultation between graders, and the use of a consensus grade, if the two graders' scores differ by more than one point.

In support of his motion for summary

judgment and in opposition to the defendants' motion for summary judgment, the plaintiff did not offer any evidence that the relief he requested would reduce the likelihood of grading errors. The regrading of an answer by a Superior Court judge would not lessen the inherent subjectivity of grading the essay answers. To the contrary, the risk of arbitrary grading would be likely to increase if a judge were to regrade an answer because: (1) the applicant's anonymity would be lost; and (2) the scoring judge would not have had the benefit of a calibration session and the experience of grading multiple answers.

Furthermore, the defendants provided evidence, pursuant to their summary judgment burden, of an additional procedural safeguard to protect applicants from arbitrary grading: an unlimited

right to retake the bar examination. Most courts have found that the right to retake the examination, by itself, provides adequate procedural protection to a bar applicant. See, e.g., Jones v. Board of Commissioners of Alabama State Bar, supra, 1003 (lack of judicial hearing does not violate due process because candidate may take examination up to five times); Lucero v. Ogden, supra, 358; Poats v. Givan, 651 F.2d 495, 497 (7th Cir. 1981) (right to retake examination four times); Tyler v. Vickery, supra, 1104; In re Mead, 361 N.E.2d 403, 405 (Mass. 1977), cert. denied, 434 U.S. 858, 98 S.Ct. 182, 54 L. Ed. 2d 131 (1977). As the United States Court of Appeals for the Fifth Circuit reasoned, even if we assume, generously, that one out of every one hundred applicants who fail the bar examination would have

passed but for arbitrary grading, the probability that the same applicant would be the victim of a grading error after two examinations is literally one in a million. Tyler v. Vickery, supra, 1104.

With one limited exception,[11] every court addressing the question of whether an applicant is constitutionally en-

[11] In Richardson v. McFadden, 540 F.2d 744, 752 (4th Cir. 1976), cert. denied, 435 U.S. 968, 98 S. Ct. 1606, 56 L. Ed. 2d 59 (1978), the United States Court of Appeals for the Fourth Circuit stated that it was not persuaded that reexamination is a more effective remedy than judicial review. The court, however, did not analyze whether reexamination satisfies due process, but only concluded that "reexamination is [not] a more effective remedy than review." Id. No court has cited this statement in Richardson with approval. Moreover, the court did not need to reach that issue, and thus the statement was dicta. See Lucero v. Ogden, 718 F.2d 355,357 (10th Cir. 1983), cert. denied, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984).

titled to a judicial hearing to regrade essay answers on a bar examination has concluded that a state is not obligated to provide such a hearing. See, e.g., Jones v. Bd. of Com. of Ala. St. Bar, supra; Lucero v. Ogden, supra, 358; Tyler v. Vickery, supra; In re Mead, supra; Mississippi Board of Bar Admissions v. Applicant F., supra, 384 ([w]e decline Applicant F's invitation that we usurp [the bar examiner's] duties and responsibilities by regrading his examination"); Petition of Pacheco, supra, 604; Loeb v. New York State Bar Board of Law Examiners, supra; McGinn v. State Bar Board of North Dakota, supra, 867; Petition of Wayland, supra, 1387; and other cases cited in annot., Court Review of Bar Examiners' Decision on Applicant's Examination, 39 A.L.R.3d 719(1971 and Sup. 1992). Courts have

consistently refused to embark on any inquiry into the integrity of examination results in the absence of clear and unequivocal allegations of probative facts that would establish fraud, imposition, discrimination or manifest unfairness on the part of the bar examiners. See, e.g., Feldman v. State Board of Bar Examiners, 438 F.2d 699, 704 (8th Cir.1971); Staley v. State Bar of California, 17 Cal. 2d 119, 121, 109 P.2d 667 (1941); In re Reardon, 378 A.2d 614,618(Del. 1977); Petition of Pacheco, supra; In re Thorne, 635 P.2d 22, 23 (Utah 1981); Hooban v. Board of Governors of Washington State Bar Assn., supra. In the present case, the plaintiff has not asserted any facts to support such a claim.

Finally, pursuant to the third prong of Mathews, requiring a judicial hearing for the purpose of regrading an appli-

cant's essay answers would impose a substantial fiscal and administrative burden on the judicial system. As a practical matter, there is a significant risk that virtually every candidate who failed the bar examination, having little to lose, would request a judicial regrading of the examination answers. A flood of biannual petitions would impose an "intolerable burden" on the court system. See Lucero v. Ogden, supra, 358; Tyler v. Vickery, supra, 1105; Whitfield v. Illinois Board of Law Examiners, 504 F.2d 474, 478 (7th Cir. 1974). Such a burden is unjustified if the procedural protections to be gained from such a burden are minimal or nonexistent.

The ultimate balance of the relevant factors compels the conclusion that a judicial hearing for the purposes of regrading the plaintiff's answers on

the essay portion of the examination is not necessary to assure fundamental fairness. Consequently, pursuant to our consideration of the factors set forth in Mathews, we conclude that a bar applicant is not constitutionally entitled to such a hearing, and thus the trial court properly denied the plaintiff's motion for summary judgment and granted summary judgment for the defendants.[12]

[12] The plaintiff also argues that, despite the lack of a statutory or Practice Book provision providing for a right to a judicial hearing for the purpose of regrading his answers, he is nonetheless entitled to this procedure because of an "informal" state history of allowing such hearings. The plaintiff does not cite, however, nor does our research uncover, any case in which a court regraded an applicant's answers. Although we have reviewed the defendants' denial of a candidate's application for admission on character grounds; see, e.g., Fairfield Bar Committee v. Esterman, 174 Conn. 548, 392 A.2d 452 (1978); In re Application of Dinan, 157 Conn. 67, 244 A.2d 608 (1968); we have not inquired into the

defendants' decision that a given applicant is not minimally competent to practice law in Connecticut. Consequently, we decline to hold that the plaintiff is entitled to a proceeding that simply does not exist, and has not existed, under our law.

III

The plaintiff's final claim is that the trial court improperly denied his motion to strike the defendants' special defense of sovereign immunity. The trial court, however, did not predicate its grant of summary judgment for the defendants on the doctrine of sovereign immunity. Consequently, the plaintiff is not aggrieved by the trial court's denial of his motion to strike the special defense. Furthermore, the defendants have not raised on appeal the issue of sovereign immunity, either as a basis of a cross appeal, or as an alternate ground to sustain the judgment of the trial court. We need not, therefore, consider the issue.

The judgment is affirmed.

In this opinion CALLAHAN, SANTANIELLO and F.X. HENNESSY, Js., concurred.

BERDON, J., dissenting. The defendants, the Connecticut bar examining committee and its administrative director, have neatly packaged their procedures with what they consider to be checks and balances to ensure that bar examinations are fairly graded. They fail, however, to address one aspect of due process that I consider to be of great importance-the perception of fairness. The plaintiff's only avenue for review of his essay examination was by the same committee responsible for his original grade, albeit different examiners. Furthermore, the plaintiff was never given the opportunity to confront the examiners in order to explain his position. In short, the review of his essay examination, which is very subjective, is, in the eyes of the applicant, part and parcel of the "Good Ole

Boys" club-that is, by the same persons responsible for preparing, establishing the standards and grading the examination. I do not believe this passes constitutional muster. I conclude that due process requires another level of review.

It is clear that a bar applicant must be afforded the protections of due process under the fourteenth amendment to the United States constitution. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); note, "Admission to the Bar: A Constitutional Analysis," 34 Vand. L. Rev. 655, 712 (1981). That process, however, must have "the appearance of evenhanded justice which is at the core of due process." Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (Harlan, J.,

concurring) (criminal contempt proceedings); L. Tribe, American Constitutional Law (2d Ed. 1988) sec. 10-16, p. 745.

The facts of the present case underscore why an applicant should be given a postexamination hearing by a board other than the examining committee that administered the examination. The plaintiff, a graduate of Georgetown Law School, a distinguished law school, obtained a converted score of 262.79 on the July, 1989 bar examination, which was below the passing converted score of 264.[1] Two of the plaintiff's twelve essay questions received grades of only one out of a possible seven points. Another essay question received a mere two out of seven. If the plaintiff had received a raw score of one-half

[1] On the February, 1990 bar exam he received a score of 260.67.

point more on any of the essay questions, including any of the above questions on which he received only one or two out of a possible seven points, he would have obtained the required converted score of 264. The diminutive value of one half of one point of a total of eighty-four possible points on a subjective examination is obvious.

The plaintiff claims that errors were made in the grading of his essay questions and that the grading process was "arbitrary and capricious." In opposition to the defendants motion for summary judgment, the plaintiff submitted the questions and his answers. The majority opinion concedes, as it must, that the essay questions are subjective. And in the field of jurisprudence, that subjectivity is at its highest. I take judicial notice of the fact that the

"right" answers in the law today may be the wrong answers for tomorrow. For example, the "separate-but-equal" doctrine endorsed by the United States Supreme Court in Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), which segregated African-Americans, would not be tolerated as a right answer today. Nor would we accept today as passing constitutional muster a regulation that prohibited women from practicing law as the United States Supreme Court held in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873).

Given the fact that essay examinations are extremely subjective, that the plaintiff's converted score of 262.79 missed the mark by a mere one half of 1 percent, and that he was never given an opportunity to argue his position directly to

the examiners who reviewed his initial score, it is understandable why he or any other person in his position would perceive that those who judged his examination were not evenhanded and that the system is not fair.

The majority, however, has a bottom line answer to this due process claim-that is, the plaintiff and others similarly situated can always retake the examination. I cannot accept this bottom line. In response to a similar argument, the Fourth Circuit Court of Appeals replied "once is enough." (Emphasis added.) Richardson v. McFadden, 540 F.2d 744, 752 (4th Cir. 1976). ("To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and,

nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.") I am sure that this sentiment would be echoed by most law school graduates, even those who have been admitted to the bar.

Accordingly, I would reverse the trial court's granting the defendants' motion for summary judgment and remand the matter for further proceedings.

Supreme Court, U.S.
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No. 93-40

In The

Supreme Court of the United States

October Term, 1993

JOHN J. SCINTO

Petitioner

v.

R. DAVID STAMM et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner John Scinto has brought a petition for writ of certiorari asking this Court to review the judgment of the Connecticut Supreme Court in *Scinto v. Stamm*, 224 Conn. 524, 620 A.2d 99 (1993). This case held that the grading procedures employed by the Connecticut Bar Examining Committee ("CBEC") "have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law," and that a judicial hearing to regrade the petitioner's essay answers, in the absence of any proof of fraud, discrimination, or manifest unfairness, is not constitutionally required. *Id.* at 534-35, reprinted in respondent's appendix at A1.[1/]

The petitioner took the Connecticut bar examination in July, 1989, and received a score of 262.79, below the passing score of 264.fn[2/] *Id.* at 525-26, Resp.

1/ The opinion in *Scinto* was published on February 9, 1993. On March 16, 1993, the Connecticut Supreme Court issued several corrected pages for its opinion, in which the substance of the opinion remained the same, but the Court added a footnote and made a minor change in the accompanying text. Since the petitioner included only the original, uncorrected version of the opinion in his joint appendix, the respondents have included the corrected version in their Appendix at A1, and it is to this corrected version that the respondents cite throughout this brief.

2/ In February, 1990, the petitioner again took the Connecticut bar examination, and received a score of 260.37. *Scinto v. Stamm*, 224 Conn. at 526, Resp. App. A3.

App. A2-A3. In March, 1990, he initiated the present action against the CBEC and R. David Stamm, its Administrative Director, alleging that the CBEC's customs, grading procedures and rules resulted in gross grading errors, created an arbitrary and capricious grading system in violation of his rights to due process under the federal and state constitutions, and caused him to fail the examination. (Memo of Dec., Pet. App. A.31.) Claiming that he deserved more points on his essays, the petitioner sought a judicial hearing on his essay examination, an order admitting him to the Bar outright, and a declaratory judgment holding unconstitutional the rules, regulations and grading procedures of the CBEC. (Memo. of Dec., Pet. App. A.31.)

Both sides filed cross motions for summary judgment, and on January 13, 1992, the trial court granted the respondents' motion and denied the petitioner's motion. The court ruled that the petitioner "ha[d] not submitted any evidence to support his allegations that the CBEC's procedures resulted in gross grading errors ... [and] no evidence to rebut the defendants' affidavit as to the procedures employed to grade the plaintiff's exam." (Memo of Dec., Pet. App. 33-34).

The petitioner timely appealed this judgment to the Connecticut Appellate Court, and on May 7, 1992, the Connecticut Supreme Court transferred the appeal

to itself, pursuant to its authority under Connecticut Rules of Practice § 4023.[3/] On February 9, 1993, the Connecticut Supreme Court affirmed the judgment of the trial Court, holding that the grading procedures employed by the CBEC, which contain numerous built-in procedural safeguards and provisions for multiple reviews of failing examinations, satisfy due process and obviate the need for, or desirability of, a judicial hearing into the adequacy of the petitioner's essay answers. *Scinto v. Stamm*, 224 Conn. at 533-34, 536-39., Resp. App., A10-A11, A13-A16.

The petitioner's motion for rehearing was denied by the Court on March 4, 1993, and the petitioner filed his petition for writ of certiorari on June 2, 1993. This petition was returned to him for failure to comply with Supreme Court Rules. The instant petition was filed on July 2, 1993, and received by respondents on July 5, 1993.

3/ Section 4023 states in relevant part: "The supreme court may transfer to itself a cause in the appellate court."

ARGUMENT

I. THE CONNECTICUT SUPREME COURT DECISION IN *SCINTO V. STAMM* DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Petitioner Has Misstated The Holding Of The Connecticut Supreme Court

The petitioner begins his argument by misstating the opinion of the Connecticut Supreme Court. He claims that the Court held that due process does not require a judicial hearing into his essay answers because "there is sufficient procedural due process in the unlimited reexamination provided for admission to the bar." (Pet. br., 12). The petitioner then goes on to claim that this purported holding is in conflict with the rulings of other courts and with this Court which, he claims, hold that such a hearing is mandated by due process. (Pet. br., 14-16). In fact, the petitioner's characterization of all of these rulings is faulty, and the Connecticut opinion under review is not in conflict with any of them.

The Connecticut Supreme Court's ruling consists of two parts.[4/] First, the Court ruled that the petitioner had not sustained his burden of establishing that the grading system employed by the CBEC was arbitrary and capricious and led to gross grading errors. *Scinto v. Stamm*, 224 Conn. at 532-33, reprinted in Resp. App., A9-A10. In conjunction with this, the Court reviewed in detail the components of the grading system, and found that they formed "a carefully crafted system that is, in fact, designed to reduce the likelihood of any capricious or idiosyncratic scoring by an individual grader." *Id.* at 533; Resp. App., A10.

Second, the Court analyzed the grading system as a whole according to the balancing test contained in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and concluded that "a judicial hearing to regrade the applicant's essay answers is not constitutionally required." *Scinto v. Stamm*, 224 Conn. at 535, Resp. App., A12. In reaching this conclusion the Court described in detail the grading procedures employed by the CBEC:

> In July, 1982, after several years of consultation with nationally recognized bar examination experts, the defendants extensively revised the format of the Connecticut bar examination. As revised, the

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4/ The opinion also addressed a number of other assertions made by the petitioner, but none of them have been raised in this petition.

examination consists of two parts: a multiple choice portion, administered in most states and known as the Multistate Bar Examination (multistate), consisting of two hundred questions; and an essay portion consisting of twelve questions. The examination as a whole is designed to test the minimal competency of a candidate to practice law in Connecticut. The present system was designed to standardize passing scores, provide for consistency in grading and to protect against idiosyncratic grading and grading errors. There is no passing or failing score on either portion of the examination.

Grading of the essay answers is done so that the graders do not know the identify of the applicant whose answers they grade. Answers to the essay questions are graded on a scale from zero to seven. In most instances, all of the examination booklets containing the answer to one of the twelve questions are distributed among three graders. Each grader assigns a score to one third of the answer booklets. In order to ensure uniformity and consistency in grading essay answers, the three graders for a particular question meet, prior to grading the essay questions, to develop a model answer and to agree upon the weight to be assigned to each component to the answers.

A candidate's multistate score is added to the candidate's converted score on the essay portion of the examination to determine the total score. To pass the examination a candidate must attain a total score of 264. If a candidate's total score is within ten points, plus or minus, of the passing score, the essay portion of the

> examination is regraded by a different grader. If this second grader assigns the same score as the previous grader for a particular question, then that score becomes the final score for that question. If the scores of the two graders differ by only one point, then the two scores are averaged. If the two scores differ by more than one point, then the two graders read the answer for a third time and agree upon the final score for that question. If a candidate's score after this process is 264 or greater, then the candidate has passed the examination, and conversely, a candidate receiving a score below 264 has failed the examination. There is no limitation on the number of times a candidate who has received a failing score may retake the examination.

Id. at 528-30; Resp. App., A-5-A7 (footnotes omitted).

The Court noted that the elaborate procedures described above combined to reduce significantly the potential capriciousness of any one grader. By contrast, the Court noted, the risk of arbitrary grading would actually *increase* in a judicial regrading of a failing examination because "(1) the applicant's anonymity would be lost; and (2) the scoring judge would not have had the benefit of a calibration session and the experience of grading multiple answers." *Id.*, 536-37; Resp. App., A13-A14.

The Court found that, *in addition to* the above described safeguards and multiple reviews of

examinations provided in the grading system, the CBEC provided as an additional safeguard the unlimited right to retake the bar examination as often as desired. After weighing *all of these factors* according to the *Mathews* balancing test, the Court concluded:

> The ultimate balance of the relevant factors compels the conclusion that a judicial hearing for the purposes of regrading the plaintiff's answers on the essay portion of the examination is not necessary to assure fundamental fairness. Consequently, pursuant to our consideration of the factors set forth in *Mathews*, we conclude that a bar applicant is not constitutionally entitled to such a hearing, and thus the trial court properly denied the plaintiff's motion for summary judgment and granted summary judgment for the defendants.

Id. at 539; Resp. App., A16 (footnote omitted).

The petitioner's present claim before this Court that the Connecticut Court's ruling rests on the unlimited opportunity for reexamination, standing alone, is false, and is belied by the words of the opinion itself. In fact, the Court's ruling rests on a careful analysis of the totality of the procedures employed by the CBEC, and, as will be discussed, does not conflict with the decision of any other court.

B. The Connecticut Supreme Court Opinion Does Not Conflict With The Holding Of Any Other Court

The petitioner claims that the Connecticut decision in *Scinto v. Stamm* conflicts with the holdings of a number of lower court cases, which he claims require judicial hearings to regrade bar examinations. Pet. br., pp. 14-17. A review of these cases, however, reveals that, not only do none of them conflict with the holding of the Connecticut decision, all of them actually support it. Several of the cited cases are directly contrary to the petitioner's position, and hold outright that due process does *not* require a judicial hearing of bar examination answers: *Loeb v. New York State Board of Law Examiners*, 144 App. Div. 2d. 813 (N.Y. App., 3rd Dept., 1988); *Bowens v. Board of Law Examiners, Etc.*, 291 S.E. 2d. 170, 172 (N.C. App. (1982); *Bailey v. Board of Law Examiners*, 508 F.Supp. 106 (W.D. Texas 1980); *Feldman v. State Board of Law Examiners*, 438 F.2d. 699 (8th Cir. 1971); and *In re Mead*, 361 N.E. 2d 403 (Mass. 1977). Several other cases cited by the petitioner hold that there is no right to a judicial reexamination of bar examination results in the absence of clear, probative facts establishing fraud, imposition, discrimination, or manifest unfairness on the part of the bar examiners, a position in accord with and noted in the *Scinto* decision,

but not at issue in the present case:[5/] *In re Thorne*, 635 P.2d 22 (Utah 1981); *In re Reardon*, 378 A.2d. 614 (Del. 1977); *Hooban v. Board of Governors*, 85 Wn. 2d 774, 539 P.2d 686 (1975); *Petition of DeOrsey*,[6/] 312 A.2d. 720 (R.I. 1973); *Application of Peterson*, 459 P.2d. 703 (Alaska 1969). Two cases did not concern hearings into bar examination answers at all: *Woodard v. Virginia Bd. of Bar Examiners*, 420 F.Supp. 211 (E.D. Va. 1976); *Cupples v. Watson*, 204 F.2d 58 D.C. Reports (D.C. Cir. 1953). Finally, one case, *Richardson v. McFadden*, 540 F.2d. 744 (4th Cir. 1976), states in dicta that the right of reexamination, *standing alone*, does not satisfy due process, but the Court could not determine from the record what review procedures if any the bar examiners provided, and did not decide what system would satisfy due process. The Connecticut procedure, as noted, provides a built-in system of review, *in addition to* an unlimited opportunity to retake the examination.

None of the cases cited by the petitioner even suggests that a failing applicant is constitutionally

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5/ The Connecticut Supreme Court expressly noted that the petitioner had not asserted any facts to support a claim of fraud, imposition, discrimination, or manifest unfairness. *Scinto v. Stamm*, 244 Conn. at 538; Resp. App., A15.

6/ The petitioner incorrectly states that the Courts in *DeOrsey* and *Thorne* regraded bar examinations. This is simply not true. The respondents are aware of no case in which a court regraded a bar examination.

entitled to a judicial hearing into his essay answers simply because he believes that he should have received a higher grade, which is the essence of the petitioner's claim. In short, none of the cited cases conflicts with the Connecticut *Scinto* decision, or even stands for the proposition that the petitioner asserts. [7/] These cases then provide no basis for granting a writ of certiorari in this case.

Nor does the *Scinto* decision conflict with any decision of this Court. As noted, the Connecticut Supreme Court carefully and correctly applied the *Matthews v. Eldridge* balancing test in determining that a judicial hearing is not constititutionally mandated, *Scinto v. Stamm*, 224 Conn. at 535-39, Resp. App. A12-A16, and contrary to the petitioner's apparent suggestion in his petition, this Court has never held otherwise.[8/]

7/ Similarly, the petitioner has misstated the holdings of a number of prior Connecticut cases. Pet. Br., 19. Not one of the cited cases concerns judicial review of bar examinations, or anything else relevant to the issues presented to this Court.

8/ *Schware v. Board of Bar Examiners of State of N.M.*, 353 U.S. 232, 239 (1957), established a rational basis standard for any due process challenge to a state's requirements for admission to its bar. This standard has frequently been applied by courts considering challenges to bar examination

(footnote cont'd)

Consequently, the petitioner's claim that conflicts exist among courts on the relevant constitutional issue is simply false, and provides no basis for granting the petition.

(footnote cont'd from previous page)

procedures, including the Connecticut Supreme Court in the case at bar. *Scinto v. Stamm*, 224 Conn. at 531-33; Resp. App. A8-A10. *See also Tofano v. Supreme Court of Nevada*, 718 F.2d 313, 315 (9th Cir. 1983); *Tyler v. Vickery*, 517 F.2d 1089, 1101 (5th Cir. 1975), *reh. denied*, 521 F.2d 815, *cert. denied*, 426 U.S. 940 (1976); *McGinn v. State Bar Board of North Dakota*, 399 N.W. 2d 864, 867 (N.D. 1987).

Contrary to petitioner's suggestion (Pet. br., 21-22), a strict scrutiny analysis is not required, and cases he has cited for this proposition are clearly inapposite. *See, In re Griffiths*, 413 U.S. 177 (1973), and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which deal with rights of non-residents or non-citizens to be admitted to a state's bar; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which concerns First Amendment commercial speech, and *Truax v. Raich*, 239 U.S. 33 (1915) which has nothing to do with admission to the bar, but concerns the right of non-citizens to be employed within a state.

II. THE ISSUES PRESENTED IN THIS CASE DO NOT WARRANT THIS COURT'S REVIEW

The essence of the petitioner's claim is that, since he did not pass the Connecticut bar examination, there must have been something wrong with it. As the Connecticut Supreme Court noted, although the case was decided on cross-motions for summary judgment, the petitioner presented *no evidence* outside of his own opinion that his answers were erroneously graded, or that the grading procedures were unfair:

> Nowhere in his supporting documentation does the plaintiff offer anything but his own opinion and conclusions, based primarily on unsworn factual assertions-contained not in his affidavit, but in his accompanying memoranda, that the grading procedures used by the defendants were unfair. Unsworn assertions of fact, summary conclusions of law and unsupported allegations in an affidavit do not entitle a party to a summary judgment...Similarly, the plaintiff, instead of offering evidence that the defendants' system of grading somehow does not conform to accepted and sound nationwide methods of scoring bar examinations, offered only his opinion

> that his answers to several of the essay questions should have received higher scores.

Scinto v. Stamm, 224 Conn. 532-33, Resp. App. A9-A10. (citations omitted).

The undisputed evidence in the case establishes that the grading procedures employed by the CBEC were initiated after lengthy consultation with national testing experts, and are currently in use in a majority of states. *Scinto v. Stamm*, 224 Conn. at 533, Resp. App.. Courts evaluating these procedures have uniformly upheld them, *id.* at 533-34, Resp. App.A10-A11, and the Connecticut Supreme Court's inquiry into their constitutional adequacy was thorough and reasoned.

Although the petitioner may be understandably disappointed that he has been unable to pass the Connecticut bar examination, his case presents no issue which merits this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the decision of the Connecticut Supreme Court in this matter should be denied.

Respectfully submitted,

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No. 93-40

In The

Supreme Court of the United States

October Term, 1993

JOHN J. SCINTO

Petitioner

v.

R. DAVID STAMM et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

APPENDIX OF THE RESPONDENTS

Appendix Table of Contents

Connecticut Supreme Court decision in
Scinto v. Stamm (corrected version) A1

JOHN J. SCINTO *v.* R. DAVID STAMM ET AL. (14538)

CALLAHAN, BORDEN, BERDON, SANTANIELLO and F. X. HENNESSY, Js.

The plaintiff, who had received a failing grade on the state bar examination, sought a declaratory judgment to determine the constitutionality of the grading procedures used by the defendant bar examining committee. The trial court denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment. From the judgment against him, the plaintiff appealed. *Held:*

1. The trial court properly denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment; contrary to the plaintiff's claim that the grading procedures employed by the defendants are arbitrary and capricious and therefore violated his due process rights, the defendant's grading procedures have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law.
2. The plaintiff's claim to the contrary notwithstanding, there is no constitutional right to a judicial hearing for the purpose of regrading an unsuccessful applicant's answers on the essay portion of the bar examination; the right to retake the examination provides adequate procedural protection.

(One justice dissenting)

Argued November 5, 1992—decision released February 9, 1993

Action for declaratory judgment to determine the constitutionality of the defendants' grading procedures for the state bar examination, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *McGrath, J.*, denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

John J. Scinto, pro se, the appellant (plaintiff).

Carolyn K. Querijero, assistant attorney general, with whom, on the brief, was *Richard Blumenthal,* attorney general, for the appellees (defendants).

BORDEN, J. The principal issues in this appeal are: (1) whether the grading procedures of the Connecticut bar examining committee are arbitrary and capricious and therefore violate due process of law; and (2) whether a bar applicant who receives a failing score on the bar examination is constitutionally entitled to a judicial hearing for the purpose of regrading the applicant's answers on the essay portion of the examination. The plaintiff, John J. Scinto, appeals from the judgment of the trial court denying his motion for summary judgment and granting the motion for summary judgment of the defendants, the Connecticut bar examining committee, and R. David Stamm, its administrative director.[1] We affirm the judgment of the trial court.

The relevant facts and procedural history are as follows. In July, 1989, the plaintiff took the Connecticut bar examination and received a failing score of 262.79,

[1] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199 (c).

which was below the standard passing score of 264.[2] The defendant then took the February, 1990 bar examination but again failed, receiving a score of 260.67. The plaintiff thereafter filed this petition in Superior Court seeking, inter alia: (1) a judicial hearing for the purpose of regrading his essay answers for the July, 1989 bar examination; (2) an injunction ordering the defendants to admit him to the Connecticut bar; and (3) a declaratory judgment that the defendants' regulations governing admission to the bar are invalid because they violate the due process clauses of the federal and state constitutions.

The defendants moved to dismiss the plaintiff's petition on the grounds that the court lacked subject matter jurisdiction because: (1) the doctrine of sovereign immunity barred the plaintiff's claims; and (2) the plaintiff's request for a declaratory judgment did not comply with Practice Book § 390 (d)[3] since proper notice had not been given to other interested parties. While this motion was pending, the plaintiff moved for permission to amend his petition by adding a claim arising out of his failure to pass the February, 1990 bar examination. The defendants opposed the motion to amend, but later agreed to withdraw their objection on the condition that the pending motion to dismiss would be made applicable to the claim arising out of the February, 1990 examination.

The trial court, *Thim, J.*, subsequently denied the defendants' motion to dismiss, ruling that the doctrine of sovereign immunity did not bar the plaintiff's claims

[2] The defendant had failed the exam on at least two occasions prior to the July, 1989 exam. He does not contest, however, the procedures for grading his examinations on the occasions prior to the July, 1989 examination.

[3] Practice Book § 390 provides in relevant part: "The court will not render declaratory judgments upon the complaint of any person . . . (d) unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof."

and that the court had subject matter jurisdiction over the declaratory judgment claim because the plaintiff, pursuant to *State ex rel. Kelman* v. *Schaffer,* 161 Conn. 522, 528, 290 A.2d 327 (1971), was entitled to cure the lack of notice prior to a final judgment. The defendants then filed an answer to the plaintiff's petition denying all of the plaintiff's claims.[4] The defendants also asserted, by way of special defense, that the doctrine of sovereign immunity barred the action because "the allegations of the complaint do not clearly demonstrate an incursion upon constitutionally protected interests." The plaintiff then moved to strike the defendants' special defense, and subsequently the trial court, *Thim J.,* denied the motion.

Both sides moved for summary judgment. The trial court, *McGrath, J.,* denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment. The trial court concluded that: (1) the grading procedures employed by the defendants were not arbitrary or capricious and therefore do not violate due process; (2) the plaintiff was not constitutionally entitled to a judicial hearing for the purpose of regrading his answers to the essay portion of the bar examination; and (3) the trial court lacked subject matter jurisdiction over the declaratory judgment aspect of the plaintiff's claim because the

[4] The plaintiff claims that, because the defendants' answer does not deny his allegations that he passed the February, 1990 bar examination, he was entitled to summary judgment on that claim. Although the trial court did not address this issue in its memorandum of decision on the motions for summary judgment, the plaintiff's claim is without merit.

The plaintiff never filed an amended petition to include the February, 1990 bar examination. Consequently, when the defendants filed their answer to the plaintiff's petition, they responded to all of the allegations contained in the petition. That petition asserted claims related to the July, 1989 examination only and, therefore, the defendants could not have answered a claim regarding the February, 1990 examination that was not included in that petition.

plaintiff had not attempted to notify any interested parties pursuant to the requirements of Practice Book § 390 (d). On appeal, the plaintiff claims that the trial court improperly: (1) concluded that the grading procedures of the defendants are not arbitrary and capricious and therefore do not violate due process; (2) concluded that he was not constitutionally entitled to a judicial hearing for the purposes of regrading his answers to the essay portion of the examination; and (3) denied his motion to strike the defendants' special defense.[5]

I

The plaintiff first claims that the trial court improperly denied his motion for summary judgment and improperly granted the defendants' motion for summary judgment because the grading procedures of the defendants are arbitrary and capricious and therefore violate his due process rights. We disagree.

In July, 1982, after several years of consultation with nationally recognized bar examination experts, the defendants extensively revised the format of the Connecticut bar examination. As revised, the examination consists of two parts: a multiple choice portion, administered in most states and known as the Multistate Bar Examination (multistate), consisting of two hundred questions;[6] and an essay portion consisting of twelve

[5] The plaintiff also appears to claim in his reply brief that the trial court improperly concluded that it lacked subject matter jurisdiction over the plaintiff's declaratory judgment claim. Absent exceptional circumstances, we will not review claims raised for the first time in an appellant's reply brief. See *Adolphson* v. *Zoning Board of Appeals*, 205 Conn. 703, 716, 535 A.2d 799 (1988); *Clark* v. *Gibbs*, 184 Conn. 410, 420, 439 A.2d 1060 (1981). An appellant's failure to raise a claim until its reply brief does not give the appellee a proper opportunity to respond. *DeLucia* v. *Burns*, 11 Conn. App. 439, 444, 527 A.2d 1234, cert. denied, 205 Conn. 803, 531 A.2d 935 (1987). We therefore conclude that this issue is not properly before this court.

[6] The answers to the multistate are scored by computer. The raw score equals the number of questions answered correctly out of the two hundred

questions. The examination as a whole is designed to test the minimal competency of a candidate to practice law in Connecticut. The present system was designed to standardize passing scores, provide for consistency in grading and to protect against idiosyncratic grading and grading errors. There is no passing or failing score on either portion of the examination.

Grading of the essay answers is done so that the graders do not know the identity of the applicant whose answers they grade. Answers to the essay questions are graded on a scale from zero to seven. In most instances, all of the examination booklets containing the answer to one of the twelve questions are distributed among three graders.[7] Each grader assigns a score to one third of the answer booklets. In order to ensure uniformity and consistency in grading essay answers, the three graders for a particular question meet, prior to grading the essay questions, to develop a model answer and to agree upon the weight to be assigned to each component of the answers.

A candidate's multistate score is added to the candidate's converted score[8] on the essay portion of the

questions. The Multistate Bar Examining Committee then scales the raw score to compensate for any degree of difficulty of the test in comparison to prior administrations of the multistate in previous years. The defendants use the multistate scaled score in calculating an applicant's total score for the Connecticut bar examination.

[7] The Connecticut bar examination is administered twice a year: once in February and once in July. Because the number of candidates that sit for the February examination is significantly lower than the number that sit in July, the defendants sometimes assign only two graders to a particular essay question on the February examination.

[8] The defendants use a complex mathematical formula to convert the essay scores to the multistate scale. The formula is as follows:

SS = Xb + Sb/Sa (Rs − Xa) where

SS = Essay examination score on the multistate scale.

Xb = Average Connecticut applicant's multistate score.

Sb = Standard deviation of Connecticut applicant's multistate score.

Sa = Standard deviation of essay portion raw scores.

Rs = Applicant's essay portion raw score.

Xa = Average essay portion raw score.

examination to determine the total score. To pass the examination a candidate must attain a total score of 264. If a candidate's total score is within ten points, plus or minus, of the passing score, the essay portion of the examination is regraded by a different grader. If this second grader assigns the same score as the previous grader for a particular question, then that score becomes the final score for that question. If the scores of the two graders differ by only one point, then the two scores are averaged. If the two scores differ by more than one point, then the two graders read the answer for a third time and agree upon the final score for that question. If a candidate's score after this process is 264 or greater, then the candidate has passed the examination, and conversely, a candidate receiving a score below 264 has failed the examination. There is no limitation on the number of times a candidate who has received a failing score may retake the examination.

"The standard of review of a trial court's decision to grant a motion for summary judgment is well established. Pursuant to Practice Book § 384, summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact; *D.H.R. Construction Co.* v. *Donnelly,* 180 Conn. 430, 434, 429 A.2d 908 (1980); a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. Practice Book §§ 380, 381; *Burns* v. *Hartford Hospital,* [192 Conn. 451, 455, 472 A.2d 1257 (1984)]. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *Town*

Bank & Trust Co. v. *Benson*, 176 Conn. 304, 309, 407 A.2d 971 (1978). *Strada* v. *Connecticut Newspapers, Inc.*, 193 Conn. 313, 317, 477 A.2d 1005 (1984). . . ." (Internal quotation marks omitted.) *Connecticut Bank & Trust Co.* v. *Carriage Lane Associates*, 219 Conn. 772, 780–81, 595 A.2d 334 (1991).

In light of the similarity of issues raised in the two motions for summary judgment, we consider the trial court's disposition of the motions together. The plaintiff, in support of his motion for summary judgment and in opposition to the defendants' motion for summary judgment, filed memoranda, copies of the essay examination questions and his answers, and a personal affidavit. The substance of these documents can be distilled into two particular claims: (1) that his essay answers were scored by impermissibly subjective grading standards that resulted in gross grading errors; and (2) that because he received a score that was close to a passing score, there is no substantial difference between his failing score and a passing score, and thus the defendants arbitrarily and capriciously concluded that he was not minimally competent to practice law in Connecticut.

The United States Supreme Court's decision in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238–39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), established the appropriate standard by which to analyze the plaintiff's claim. "A State cannot exclude a person from the practice of law . . . in a manner or for reasons that contravene the Due Process . . . Clause of the Fourteenth Amendment. . . . A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a *rational connection* with the applicant's fitness or capacity to practice law." (Emphasis added.) Id.; *Scott* v. *State Bar Examining Committee*, 220 Conn. 812, 820, 601 A.2d 1021 (1992).

The plaintiff, pursuant to his motion for summary judgment, had the heavy burden of establishing that the grading procedures employed by the defendants are arbitrary and capricious, and that they have no rational connection to achieving the legitimate state interest of requiring minimal competency to practice law. See, e.g., *Tofano* v. *Supreme Court of Nevada*, 718 F.2d 313, 315 (9th Cir. 1983); *Tyler* v. *Vickery*, 517 F.2d 1089, 1101 (5th Cir. 1975), reh. denied, 521 F.2d 815 (5th Cir.), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976); *Chaney* v. *State Bar of California*, 386 F.2d 962, 964 (9th Cir. 1967), cert. denied, 390 U.S. 1011, 88 S. Ct. 1262, 20 L. Ed. 2d 162 (1968); *McGinn* v. *State Bar Board of North Dakota*, 399 N.W.2d 864, 867 (N.D. 1987); *Petition of Wayland*, 510 P.2d 1385, 1387 (Okla. 1973). Courts have uniformly held that an examination consisting of essays is not overly subjective, and is a rational method of assessing a candidate's competency to practice law. See, e.g., *Tofano* v. *Supreme Court of Nevada*, supra; *McGinn* v. *State Bar Board of North Dakota*, supra; *Dinger* v. *State Bar Board of North Dakota*, 312 N.W.2d 15, 18 (N.D. 1981). Likewise, a state is entitled to establish a minimum score for passing a bar examination without offending due process. *In re Fischer*, 425 A.2d 601, 602 (Del. 1980); *Dinger* v. *State Bar Board of North Dakota*, supra; *Petition of Pacheco*, 85 N.M. 600, 604, 514 P.2d 1297 (1973); see also *Bailey* v. *Board of Law Examiners of Texas*, 508 F. Sup. 106, 108 (W.D. Tex. 1980).

The trial court concluded that "[t]he plaintiff has not submitted any evidence to support his allegations that the [defendants'] procedures resulted in gross grading errors. Further, the plaintiff submits no evidence to rebut the [defendants'] affidavit." We agree. Nowhere in his supporting documentation does the plaintiff offer anything but his own opinion and conclusions, based primarily on unsworn factual assertions—contained not

in his affidavit, but in his accompanying memoranda, that the grading procedures used by the defendants were unfair. Unsworn assertions of fact, summary conclusions of law and unsupported allegations in an affidavit do not entitle a party to a summary judgment. See, e.g., *Bartha* v. *Waterbury House Wrecking Co.*, 190 Conn. 8, 12, 459 A.2d 115 (1983); *Rathkopf* v. *Pearson*, 148 Conn. 260, 264, 170 A.2d 135 (1961) ("[a]n allegation setting forth no evidentiary facts avails nothing").

The plaintiff failed to offer evidence that setting the passing score at 264 is arbitrary or capricious. The defendants' affidavit in support of their motion for summary judgment, moreover, stated that they arrived at the passing score only after extensive consultation with testing experts. Similarly, the plaintiff, instead of offering evidence that the defendants' system of grading somehow does not conform to accepted and sound nationwide methods of scoring bar examinations, offered only his opinion that his answers to several of the essay questions should have received higher scores.

The defendants' extensive affidavit meticulously described the current format of the bar examination, its procedural safeguards and its provision for multiple review of examinations falling within ten points of the passing score. The affidavit set forth a carefully crafted system that is, in fact, designed to reduce the likelihood of any capricious or idiosyncratic scoring by an individual grader. Each answer is compared to the model answer created by three graders at a calibration session, and an answer may be read up to two additional times if the answer is part of an examination whose score falls within ten points of the passing score, and if there is any disagreement as to the proper score for that answer.

According to the undisputed contention of the defendants, this system is "state of the art" and is currently in use in most states. Courts have uniformly upheld

grading systems such as the defendants' that offer multiple protections from arbitrary grading. See, e.g., *Tyler* v. *Vickery*, supra, 1105; *Singleton* v. *Louisiana State Bar Assn.*, 413 F. Sup. 1092, 1099–1100 (E.D. La. 1976); *In re Application of Bettine*, Docket No. S-4985 (Alaska Nov. 13, 1992); *Mississippi Board of Bar Admissions* v. *Applicant F.*, 582 So. 2d 377, 384 (Miss.), cert. denied sub nom. *Zebert* v. *Mississippi Board of Bar Admissions*, U.S. , 112 S. Ct. 591, 116 L. Ed. 2d 616 (1991); *Loeb* v. *New York State Bar Board of Law Examiners*, 144 App. Div. 2d 813, 534 N.Y.S.2d 559 (1988); *McGinn* v. *State Bar Board of North Dakota*, supra; *Dinger* v. *State Bar Board of North Dakota*, supra, 16; *Hooban* v. *Board of Governors of Washington State Bar Assn.*, 85 Wash. 2d 774, 539 P.2d 686 (1975), appeal dismissed, 424 U.S. 902, 96 S. Ct. 1092, 47 L. Ed. 2d 306 (1976); and other cases cited in annot., Validity, Under Federal Constitution, of State Bar Examination Procedures, 30 A.L.R. Fed. 934 (1976 & Sup. 1992). Under these circumstances, we conclude that the grading procedures employed by the defendants have a rational connection to the state's substantial interest in assessing an applicant's competency to practice law. Consequently, the trial court properly denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment.

II

The plaintiff next claims that the trial court improperly denied his motion for summary judgment and improperly granted the defendants' motion for summary judgment because he is constitutionally entitled, as a matter of procedural due process,[9] to a judicial hearing for the purpose of regrading his answers on the essay portion of the bar examination. We disagree.

[9] Although the plaintiff purports to rely on both the federal and state constitutions, he has failed to brief or analyze independently any state constitutional provision. Consequently, we limit our discussion to the relevant

The United States Supreme Court set forth three factors to consider when analyzing whether an individual is constitutionally entitled to a particular judicial or administrative procedure: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." Id., 335.

Application of the *Mathews* test to the present case compels the conclusion that a judicial hearing to regrade the applicant's essay answers is not constitutionally required. Admittedly, under the first prong of *Mathews*, an applicant has a strong interest in pursuing his chosen profession. *Tyler* v. *Vickery*, supra, 1104. An individual does not have, however, an absolute right to practice law. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238–39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *Jones* v. *Board of Commissioners of Alabama State Bar*, 737 F.2d 996, 1002 (11th Cir. 1984). Whether the applicant's interest is of sufficient weight to compel the requested relief can be determined only by analyzing the second and third prongs of *Mathews*. *Lucero* v. *Ogden*, 718 F.2d 355, 358–59 (10th Cir. 1983),

federal constitutional claim. *State* v. *Joly*, 219 Conn. 234, 258 n.16, 593 A.2d 96 (1991).

The fourteenth amendment to the United States constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law . . . ."

cert. denied, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984).

The applicant's interest "militates . . . in favor of a hearing only if hearings are [a] demonstrably more efficacious means of safeguarding that interest than" the other procedural protections that the defendants currently provide. *Tyler* v. *Vickery*, supra, 1104. In the present case, there is no evidence that the defendants' grading system is not effective in revealing grading errors or that it inadequately guards against the risk, if any, of an erroneous deprivation of an applicant's interest.[10] On the contrary, there is uncontroverted evidence that the defendants' system of grading, by providing multiple rereadings of examinations that fall within ten points of a passing score, effectively protects against idiosyncratic or arbitrary grading. Although the grading of any essay examination may involve some inherent subjectivity, the potential capriciousness of any one grader is significantly reduced by: (1) the use of examination numbers to protect the identity of the applicant; (2) the use of a model answer by which to measure an applicant's answer; (3) the regrading of any examination that falls within ten points of passing; and (4) the consultation between graders, and the use of a consensus grade, if the two graders' scores differ by more than one point.

In support of his motion for summary judgment and in opposition to the defendants' motion for summary judgment, the plaintiff did not offer any evidence that the relief he requested would reduce the likelihood of grading errors. The regrading of an answer by a Superior Court judge would not lessen the inherent subjectivity of grading the essay answers. To the contrary, the risk of arbitrary grading would be likely to increase

[10] The plaintiff has not claimed that the defendants committed a mathematical error in computing his total score. His claim is simply that he was entitled to a higher score on several of his answers to the essay questions.

if a judge were to regrade an answer because: (1) the applicant's anonymity would be lost; and (2) the scoring judge would not have had the benefit of a calibration session and the experience of grading multiple answers.

Furthermore, the defendants provided evidence, pursuant to their summary judgment burden, of an additional procedural safeguard to protect applicants from arbitrary grading: an unlimited right to retake the bar examination. Most courts have found that the right to retake the examination, by itself, provides adequate procedural protection to a bar applicant. See, e.g., *Jones* v. *Board of Commissioners of Alabama State Bar*, supra, 1003 (lack of judicial hearing does not violate due process because candidate may take examination up to five times); *Lucero* v. *Ogden*, supra, 358; *Poats* v. *Givan*, 651 F.2d 495, 497 (7th Cir. 1981) (right to retake examination four times); *Tyler* v. *Vickery*, supra, 1104; *In re Mead*, 372 Mass. 253, 256, 361 N.E.2d 403 (Mass. 1977), cert. denied, 434 U.S. 858, 98 S. Ct. 182, 54 L. Ed. 2d 131 (1977). As the United States Court of Appeals for the Fifth Circuit reasoned, even if we assume, generously, that one out of every one hundred applicants who fail the bar examination would have passed but for arbitrary grading, the probability that the same applicant would be the victim of a grading error after two examinations is literally one in ten thousand.[11] *Tyler* v. *Vickery*, supra, 1104.

[11] We note that the Fifth Circuit in *Tyler* v. *Vickery*, 517 F.2d 1089, 1104 (5th Cir.), reh. denied, 521 F.2d 815 (5th Cir. 1975), cert. denied, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976), stated the probability that the same applicant would be the victim of a grading error after two examinations is "literally one in a million." Although we do not profess to any particular acumen for the theory of probabilities, our research reveals that, under the assumptions applied by the Fifth Circuit, the probability of failure is one in ten thousand. See generally R. Epstein, The Theory of Gambling and Statistical Logic (Rev. Ed. 1977) 12–24. We conclude, nevertheless, that a one in ten thousand chance of a grading error does not constitute, as a matter of law, an arbitrary or capricious procedure in violation of the applicant's due process rights.

With one limited exception,[12] every court addressing the question of whether an applicant is constitutionally entitled to a judicial hearing to regrade essay answers on a bar examination has concluded that a state is not obligated to provide such a hearing. See, e.g., *Jones* v. *Board of Commissioners of Alabama State Bar*, supra; *Lucero* v. *Ogden*, supra, 358; *Tyler* v. *Vickery*, supra; *In re Mead*, supra; *Mississippi Board of Bar Admissions* v. *Applicant F.*, supra, 384 ("[w]e decline Applicant F's invitation that we usurp [the bar examiner's] duties and responsibilities by regrading his examination"); *Petition of Pacheco*, supra, 604; *Loeb* v. *New York State Bar Board of Law Examiners*, supra; *McGinn* v. *State Bar Board of North Dakota*, supra, 867; *Petition of Wayland*, supra, 1387; and other cases cited in annot., Court Review of Bar Examiners' Decision on Applicant's Examination, 39 A.L.R.3d 719 (1971 and Sup. 1992). Courts have consistently refused to embark on any inquiry into the integrity of examination results in the absence of clear and unequivocal allegations of probative facts that would establish fraud, imposition, discrimination or manifest unfairness on the part of the bar examiners. See, e.g., *Feldman* v. *State Board of Bar Examiners*, 438 F.2d 699, 704 (8th Cir. 1971); *Staley* v. *State Bar of California*, 17 Cal. 2d 119, 121, 109 P.2d 667 (1941); *In re Reardon*, 378 A.2d 614, 618 (Del. 1977); *Petition of Pacheco*, supra; *In re Thorne*, 635 P.2d 22, 23 (Utah 1981); *Hooban* v. *Board of Governors of Washington State Bar Assn.*, supra. In the present case, the plaintiff has not asserted any facts to support such a claim.

[12] In *Richardson* v. *McFadden*, 540 F.2d 744, 752 (4th Cir. 1976), cert. denied, 435 U.S. 968, 98 S. Ct. 1606, 56 L. Ed. 2d 59 (1978), the United States Court of Appeals for the Fourth Circuit stated that it was not persuaded that reexamination is a more effective remedy than judicial review. The court, however, did not analyze whether reexamination satisfies due process, but only concluded that "reexamination is [not] a more effective remedy than review." Id. No court has cited this statement in *Richardson* with approval. Moreover, the court did not need to reach that issue, and

Finally, pursuant to the third prong of *Mathews*, requiring a judicial hearing for the purpose of regrading an applicant's essay answers would impose a substantial fiscal and administrative burden on the judicial system. As a practical matter, there is a significant risk that virtually every candidate who failed the bar examination, having little to lose, would request a judicial regrading of the examination answers. A flood of biannual petitions would impose an "intolerable burden" on the court system. See *Lucero* v. *Ogden*, supra, 358; *Tyler* v. *Vickery*, supra, 1105; *Whitfield* v. *Illinois Board of Law Examiners*, 504 F.2d 474, 478 (7th Cir. 1974). Such a burden is unjustified if the procedural protections to be gained from such a burden are minimal or nonexistent.

The ultimate balance of the relevant factors compels the conclusion that a judicial hearing for the purposes of regrading the plaintiff's answers on the essay portion of the examination is not necessary to assure fundamental fairness. Consequently, pursuant to our consideration of the factors set forth in *Mathews*, we conclude that a bar applicant is not constitutionally entitled to such a hearing, and thus the trial court properly denied the plaintiff's motion for summary judgment and granted summary judgment for the defendants.[13]

thus the statement was dicta. See *Lucero* v. *Ogden*, 718 F.2d 355, 357 (10th Cir. 1983), cert. denied, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984).

[13] The plaintiff also argues that, despite the lack of a statutory or Practice Book provision providing for a right to a judicial hearing for the purpose of regrading his answers, he is nonetheless entitled to this procedure because of an "informal" state history of allowing such hearings. The plaintiff does not cite, however, nor does our research uncover, any case in which a court regraded an applicant's answers. Although we have reviewed the defendants' denial of a candidate's application for admission on character grounds; see, e.g., *Fairfield Bar Committee* v. *Esterman*, 174 Conn. 548, 392 A.2d 452 (1978); *In re Application of Dinan*, 157 Conn. 67, 244 A.2d 608 (1968); we have not inquired into the defendants' decision that a given applicant is not minimally competent to practice law in Connecticut. Consequently, we decline to hold that the plaintiff is entitled to a proceeding that simply does not exist, and has not existed, under our law.

III

The plaintiff's final claim is that the trial court improperly denied his motion to strike the defendants' special defense of sovereign immunity. The trial court, however, did not predicate its grant of summary judgment for the defendants on the doctrine of sovereign immunity. Consequently, the plaintiff is not aggrieved by the trial court's denial of his motion to strike the special defense. Furthermore, the defendants have not raised on appeal the issue of sovereign immunity, either as a basis of a cross appeal, or as an alternate ground to sustain the judgment of the trial court. We need not, therefore, consider this issue.

The judgment is affirmed.

In this opinion CALLAHAN, SANTANIELLO and F. X. HENNESSY, Js., concurred.

BERDON, J., dissenting. The defendants, the Connecticut bar examining committee and its administrative director, have neatly packaged their procedures with what they consider to be checks and balances to ensure that bar examinations are fairly graded. They fail, however, to address one aspect of due process that I consider to be of great importance—the perception of fairness. The plaintiff's only avenue for review of his essay examination was by the same committee responsible for his original grade, albeit different examiners. Furthermore, the plaintiff was never given the opportunity to confront the examiners in order to explain his position. In short, the review of his essay examination, which is very subjective, is, in the eyes of the applicant, part and parcel of the "Good Ole Boys" club--that is, by the same persons responsible for preparing, establishing the standards for and grading the examination. I do not believe this passes constitutional muster. I conclude that due process requires another level of review.

It is clear that a bar applicant must be afforded the protections of due process under the fourteenth amendment to the United States constitution. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238–39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); note, "Admission to the Bar: A Constitutional Analysis," 34 Vand. L. Rev. 655, 712 (1981). That process, however, must have "the appearance of evenhanded justice which is at the core of due process." *Mayberry* v. *Pennsylvania,* 400 U.S. 455, 469, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971) (Harlan, J., concurring) (criminal contempt proceedings); L. Tribe, American Constitutional Law (2d Ed. 1988) § 10-16, p. 745.

The facts of the present case underscore why an applicant should be given a postexamination hearing by a board other than the examining committee that administered the examination. The plaintiff, a graduate of Georgetown Law School, a distinguished law school, obtained a converted score of 262.79 on the July, 1989 bar examination, which was below the passing converted score of 264.[1] Two of the plaintiff's twelve essay questions received grades of only one out of a possible seven points. Another essay question received a mere two out of seven. If the plaintiff had received a raw score of one-half point more on any of the essay questions, including any of the above questions on which he only received one or two out of a possible seven points, he would have obtained the required converted score of 264. The diminutive value of one half of one point of a total of eighty-four possible points on a subjective examination is obvious.

The plaintiff claims that errors were made in the grading of his essay questions and that the grading process was "arbitrary and capricious." In opposition to the defendants' motion for summary judgment, the

[1] On the February, 1990 bar exam he received a score of 260.67.

plaintiff submitted the questions and his answers. The majority opinion concedes, as it must, that the essay questions are subjective. And in the field of jurisprudence, that subjectivity is at its highest. I take judicial notice of the fact that the "right" answers in the law today may be the wrong answers for tomorrow. For example, the "separate-but-equal" doctrine endorsed by the United States Supreme Court in *Plessy* v. *Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), which segregated African-Americans, would not be tolerated as a right answer today. Nor would we accept today as passing constitutional muster a regulation that prohibited women from practicing law as the United States Supreme Court held in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873).

Given the fact that essay examinations are extremely subjective, that the plaintiff's converted score of 262.79 missed the mark by a mere one half of 1 percent, and that he was never given an opportunity to argue his position directly to the examiners who reviewed his initial score, it is understandable why he or any other person in his position would perceive that those who judged his examination were not evenhanded and that the system is not fair.

The majority, however, has a bottom line answer to this due process claim—that is, the plaintiff and others similarly situated can always retake the examination. I cannot accept this bottom line. In response to a similar argument, the Fourth Circuit Court of Appeals replied "*once is enough.*" (Emphasis added.) *Richardson* v. *McFadden*, 540 F.2d 744, 752 (4th Cir. 1976). ("To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and, nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that

delay in getting it is an injury.") I am sure that this sentiment would be echoed by most law school graduates, even those who have been admitted to the bar.

Accordingly, I would reverse the trial court's granting the defendants' motion for summary judgment and remand the matter for further proceedings.

Supreme Court, U.S.
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No. 93-40

In The Supreme Court of The United States
October Term, 1993

John J. Scinto, Petitioner Pro Se

v.

R. David Stamm, et al
Respondents

On Petition for Writ of Certiorari to
The Supreme Court of Connecticut

Reply to Brief in Opposition

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STATEMENT OF THE CASE AND ARGUMENT

The petitioner asked for a bar examination committee hearing several times, but was denied each time. Furthermore, the respondents have stated that there is no right to a hearing in informational letters sent to the applicants, thereby rendering it futile to continue to seek a committee hearing.

Scinto v. Stamm, 224 Conn 524 (1993), holds inter alia, as admitted in respondents' Statement of the Case, that there is jurisdiction for a bar examination judicial hearing on grounds of manifest unfairness. This has been my claim all along and still is. The claim is that the grading was so grossly unfair on my July, 1989 and February, 1990

essays that it was manifestly unfair. On four of the twelve essay questions of the first exam I received a score of 1 out of a possible 7, although the answers were all basically correct. On one question I received a score of 1.5 which per se was proof that one grader gave me a 2 and another grader gave me a 1 on that question. Thus, the grader giving me a 2 would have passed me on the overall bar exam. That difference of 1/2 raw score point would have sufficed.

As for the second Scinto v. Stamm opinion, the "minor change" in it is contrary to procedural due process since it was made without notice to the petitioner until the respondents' brief in opposition was received. The "minor change" (Resp. br., f.n. 1) said that the probability of an applicant's being

erroneously failed on two bar exams was not really 1 in 1,000,000 as stated in the first opinion, but 1 in 10,000. That is 100 times more probability, and is much more than a "minor change." It is another example of the multitude of errors committed in the grading of the petitioner's two contested bar exams.

Resp. br., f.n. 2 evidences still another error by the respondents in alleging that I received a score of 260.37 on the February, 1990 exam, whereas, at page A3 they allege that it was 260.67. Furthermore, re this exam, the committee published an errata letter admitting that two of the graders had erred in their grading methods. Moreover, my scoresheet shows an MBE raw score of 120 compared to the Connecticut average of 119.95. However, it also shows an MBE scaled score of

135.12 for me compared to 135.28 for the Connecticut average. That is clearly a computation error. Yet the respondents refused to respond to my allegations about it, and the Connecticut Supreme Court ignored it.

Another error was made when the Connecticut Supreme Court refused to reverse the trial court's granting of the respondents' cross motion for summary judgment on the ground of lack of subject matter jurisdiction. In Connecticut only a motion to dismiss may be used to challenge subject matter jurisdiction.

Furthermore, the petitioner filed his motion for summary judgment prior to the respondents' cross motion for summary judgment. Yet the trial court heard the cross motion first, and then decided not to hear the petitioner's motion.

However, the trial court did hear it later on the petitioner's motion to reconsider.

Regarding evidence, the petitioner submitted the particularly important evidence of his three peronal affidavits, the committee's sample answers, and his memorandum in opposition to the motion to dismiss which was admitted as evidence by Judge Thim. None of it was timely or properly objected to by the respondents.

Timeliness, furthermore, was lacking when the respondents filed this current brief in opposition. My petition for certiorari was filed on June 2, 1993. Then the Chief Clerk required a table of authorities to be added to it. No substantive changes would have been allowed, nor were any made. The respondents had until July 2, 1993 to file a

brief in opposition. However, they did not file one until July 30, 1993. That was 28 days late, and the petitioner went on vacation before receiving his copies. For the above reasons the brief in opposition should be discountenanced.

Next, the fact that the Connecticut Supreme Court found the grading system to be "carefully crafted" (Resp. br.5) (Scinto v. Stamm, supra, at p. 533) does not detract from the essence of the rationale of their holding: that unlimited reexamination provides sufficient due process. This was established by the court at p. 537 citing three cases with that rationale: Tyler v. Vickery, 517 F2d 1089, 1101, 1104 (5Cir. 1975), reh. den., 521 F2d 815 (5 Cir.), cert. den. 426 U.S. 490 (1976)at 535, 536, 537; Lucero v. Ogden, 718 F2d 355, 358; and In re Mead, 361 NE2d 403, 405 (Mass.

1977). Each of them held that the right to unlimited reexamination is sufficient due process and obviates the need for a hearing. This conflicts with Michigan and Alaska and other states. Both allow unlimited reexamination, bar examination committee hearings, and judicial hearings. Edwards v. Mich. BLE, 394 Mich 949 (1975); App of McKay, 706 P2d 684 (AK, 1985).

The respondents' quotation of the court's description of the grading procedures does not diminish the petitioner's arguments (Resp. br., 5-8).

At p. 9 the respondents err in saying that my citations of my petition at p. 14-17 are from lower courts. In fact, they are from United States Circuit Courts of Appeal and District Courts, and high state courts.

Three of my citations referred to

by respondents (Resp. br. 9), contrary to their argument, clearly are authority for bar examination judicial hearings. Bowens v. BLE, 291 SE2d 170, 173 (N.C. App. 1982); Feldman v. St. Bd. LE, 438 F2d 699, 702-703 (8 Cir. 1971); and In re Mead, 36 NE2d 403, 406.

Even if Loeb v. NY St Bd LE, 144 App Div 2d 813 (1988) and Bailey v. Bd of LE, 508 F Supp 106 (WD Tex. 1980) are taken to grant administrative hearings on bar exam regrading, they are authority for some kind of hearing; whereas, the Connecticut Supreme Court and the committee have denied me any kind of hearing.

Moreover, my other citations criticized by the respondents do hold as I stated. At the bottom of Resp. br. p. 9 the respondents state that several of my citations hold that there is no right to

a judicial hearing on bar exams if there are no clear, probative facts establishing inter alia manifest unfairness. That is to say that there is a right to a judicial hearing on bar exams if there are clear, probative facts establishing inter alia manifest unfairness. That is my position. Furthermore, the correct statement of these holdings is that an allegation of the above is sufficient. That is, you do not have to prove your case before you are entitled to a hearing on it. Barde v. Bd of Trustees, 207 Conn 59 (1988); App of McKay, supra at 686 (allegations of gross grading errors); Bowens v. Bd of LE, 291 SE2d 170, 173 (NC, 1982); Petition of DeOrsey, 112 RI 536, 543 (1973); Richardson v. McFadden, 540 F2d 744, 750 (4Cir., 1976); Schware v. BBE, NM, 353 U.S. 232, 239 (1957).

The cases cited by the respondents' brief at the top of p. 10 do allow bar exam hearings for manifest unfairness, but contrary to the respondents' statement, whether my essays were graded manifestly unfairly is very much at issue. One example of it is that on the July, 1989 essays I received four grades of 1 out of a possible 7 though the answers were all basically correct and clearly explained.

Going on with Resp. br. 10 we see that the respondents misapply Richardson v. McFadden, supra at 752. The court said that review is more effective than reexam, and that an adequate review of failing papers must be provided. A failing candidate receiving scores comparable to a passing candidate's scores with no consistently applied distinction between them deserves to pass also.

Id, at p. 751. The court ordered the United States District Court to order that two of the plaintiffs be certified as having passed the South Carolina Bar. Id, p. 752.

The respondents further allege that two of my citations did not concern hearings into bar exam answers at all. They are Woodward v. Va Bd Bar Ex, 420 F Supp 211 (ED, Va 1976) and Cupples v. Watson, 204 F2d 58 DC Reports (DC Cir 1953), 92 App DC 166. However, Woodward at p. 214 concludes that the job relatedness of the Virginia bar exam will be measured by the principles of Richardson v. McFadden, supra. At p. 748 Richardson held that under the 14th Amendment, the bar exam must be job related. At p. 752 it confers a bar exam judicial hearing right. Therefore, so does Woodward.

In Cupples a United States District

Court read the plaintiff's exam to practise patent law before the United States Patent Office. He also read the plaintiff's answers and reviewed the grading. He found that the Patent Office had acted fairly and without discrimination. The United States Court of Appeals for the DC Circuit affirmed.

Re: Resp. br. , f.n. 6 the bar examining committees regraded in DeOrsey, supra; and in the Thorne case, 635 P2d 22 (Utah 1981)but these were overseen by the courts per the two decisions.

Resp. br., f.n. 7 misstates that none of the petitioner's prior Connecticut cases concerns bar exam judicial hearings. Pet. Br., 19. However, the trial court allowed the petitioner's memorandum in opposition to motion to dismiss into evidence since the transcript of his quotations from it came

out with many errors. The memorandum states at p.7 that the committee admits in their memorandum in support of motion to dismiss from the United States District Court, of September 13, 1983, "In Connecticut an unsuccessful bar candidate may petition the Superior Court for a hearing relative to the unfavorable decision by the state bar examining committee. In re App of Dinan,157 Conn 67, 71 (1968); In re App of Griffiths, 162 Conn 249, 252 (1972). In addition the procedure described in Welch v. Smith, 468 F Supp 153 (1980) as administered by the Vermont Supreme Court (Vermont's high state court) is identical to that which exists in Connecticut as administered by the Superior Court. Fairfield Bar Comm. v. Esterman, 174 Conn 548, 551 (1978); Heiberger v. Clark..." (148 Conn 177,

1961).

The Esterman case held at p. 550: "Proceedings for admission of attorneys to practise law in our courts are not actions or suits at law but are in the nature of investigations by the court or their representatives to determine whether the particular candidate is qualified to become an officer of the courts. Heiberger v. Clark, supra at 182; In re App of Dodd, 131 Conn 702, 707; Rosenthal v. St Bar Ex Comm, 116 Conn 409, 415. The end result of the proceedings is in the nature of a judgment from which an appeal lies to this court. Heiberger v. Clark, supra, 183; In re App of Dodd, supra, 707; O'Brien's Pet., 79 Conn 46, 59."

In re App of Griffiths, supra, 252; 413 U.S. 717 (1973), cited Truax v. Raich, 239 U.S. 33, 35 (1915)which

holds that the right to the common occupations is the very essence of the personal freedom, and opportunity of the 14th Amendment.

In Mrotek v. Nair, 4 Conn Cir 313; 231 Atl 2d 95, 97 (1967) the plaintiff failed the Connecticut bar exam three times and he sought exam materials and notes. p. 97. At p. 100: "While statutes have been passed to aid the judicial department of each state in the admission of attorneys to practise in the courts, no statute can control the judicial department; the rule-making power is in the Superior Court." Heiberger v. Clark, supra, 169.

"The plaintiff is not without a right to be heard on his complaint, for such a right may be exercised by a petition to the Superior Court." Id, p. 100.

As for the remainder of p. 12 of

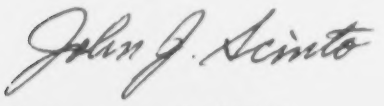
the respondents' brief, the petitioner holds to the brief of his petition for writ of certiorari.

The petitioner has disputed much of the respondents' evidence, and has objected to much of it. Even the petitioner's citations in support of the correctness of his bar exam answers is evidence disputing the respondents' arguments.

The respondents' characterization of the Connecticut bar examination as "state of the art" is faulty in many ways. There is a bound beyond which essay grading becomes grossly arbitrary and manifestly unfair. I submit that the bound has been exceeded in this case.

For the foregoing reasons the respondents' brief should not be countenanced.

Respectfully submitted,



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